APPENDIX A.

STATE OF NEW YORK.

OFFICE OF THE ATTORNEY-GENERAL.

Opinion Rendered to the Senate of the State of New York Relative to the Constitutionality of the Charter of the Long Sault Development Co.

LONG SAULT DEVELOPMENT COMPANY—CHARTER—CONSTITUTIONALITY.

Chapter 355 of the Laws of 1907 granting certain powers and privileges to the Long Sault Development Company is unconstitutional in that:

First. It contravenes section 18 of article III of the State Constitution, which provides that the Legislature shall not pass a private or local bill granting to any private corporation, association or individual any exclusive privilege, as contemplated by section 18 of article III of the Constitution.

Second. It violates section 7 of article VII of the State Constitution, which provides that the lands of the State now owned or hereafter acquired, constituting the Forest Preserve, as now fixed by law, shall be forever kept as wild forest lands, and shall not be leased, sold or exchanged, or taken by any corporation, public or private. The bed of the St. Lawrence river, which, by the act in question, is directed to be conveyed to the Long Sault Development Company, is owned by the State and was so owned at the time the provision of the Constitution was adopted, and was included within the Forest Preserve, as defined by section 100 of chapter 332 of the Laws of 1893, describing the lands included within the State Forest Preserve.

Third. The act in question is a private bill and embraces more than one subject, and is, therefore, in violation of article III, section 16 of the State Constitution, which provides that no private or local bill which may be passed by the Legislature shall embrace more than one subject, and that shall be expressed in its title.

Fourth. The act is invalid as being in excess of the powers of the Legislature, in that it provides for the alienation by the State to the Long Sault Development Company of title of the lands in the bed of the St. Lawrence river. The title of

the State in these lands is a sovereign right, rather than a proprietary title. It is inconsistent with that right, which must be exercised for the benefit of the whole people, that the title to the bed of a navigable stream should be granted in fee to a private corporation.

OPINION.

I herewith submit my opinion to your honorable body, pursuant to your resolution of March 29, 1912, which is as follows :

> " WHEREAS, An act constituting chapter 355 of the Laws of 1907, provides among other things that certain persons therein named shall be a corporation to be designated as the 'Long Sault Development Company'; and
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> " WHEREAS, Such act further purports to convey to said corporation valuable and exclusive privileges and rights, and directs the conveyances to said corporation of certain lands belonging to the State under the waters of the St. Lawrence river and referred to in said act; and
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> " WHEREAS, It is claimed that said corporation is proceeding under such act to acquire private lands, and to secure the consent of the governments of the United States, and of the Dominion of Canada, confirming said act and the privileges assumed to be granted thereby; and
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> " WHEREAS, It is further claimed that such act is unconstitutional in that it assumes to convey exclusive rights and privileges by special enactment, and further assumes to convey a portion of the forest preserve of the State which by the constitution is made inalienable on the part of the State ; be is therefore
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> " *Resolved*, That the Attorney-General of the State is hereby requested to transmit to the Senate for its further consideration his written opinion as to whether such act as aforesaid contravenes the constitution of the State in any of the matters herein referred to, or in any other particulars ; and if in his judgment it does, what if any present action or proceedings may be brought by

the State to ascertain judicially such fact; and that such written opinion be ready for submission on the reconvening of the Senate in the year 1913, or at any time prior thereto if the same shall be convened in extraordinary session and prepared to receive the same."

(Here follows what the Attorney General describes as "Substantial Provision of the Act.")

OPINION.

The act in question, chapter 355 of the Laws of 1907, contravenes section 18 of article III of the State Constitution.

Section 18 of article III of the State Constitution is as follows:

> "The Legislature shall not pass a private or local bill in any of the following cases: * * * granting to any private corporation, association or individual any exclusive privilege, immunity or franchise whatever."

This provision of the State Constitution was not inserted until 1874 and took effect January 1, 1875. I have been unable to find any decision of our courts since that time directly involving the question here presented, namely: does a grant by the Legislature to a private corporation of a right or privilege to dam a navigable stream and appropriate and utilize the whole power therefrom contravene the above provision.

The Act of 1907 is plainly a private and a local bill.

It is a private bill in that it relates only to a particular corporation, organized for private gain, to be controlled by private stockholders.

The Court of Appeals, in Economic Power & Construction Company vs. The City of Buffalo, 195 N. Y., 286, held that every act incorporating a company for private gain and generally all acts relating to a single corporation are private acts. This act comes under the above definition and is, therefore, a private act.

The courts define a local act as one which in its subject relates to but a portion of the people of the State or to their

property, and may not, either in its subject, operation or immediate and necessary results, affect the people of the State or their property in general. People vs. Supervisors of Chautauqua, 43 N. Y., 10 ; Johnston vs. Spicer, 107 N. Y., 201 ; Astor vs. Arcade Railroad Co., 113 N. Y., 93.

This act comes clearly within the above definition and is, therefore, a local act, within the meaning of section 18, article III of the Constitution.

It remains to be determined whether the rights and privileges granted are exclusive, within the meaning of the Constitution.

By section 3 of the act in question, the Long Sault Development Company is given the right "to erect, construct, maintain, operate and use such dam or dams, canal or canals, reservoir or reservoirs, gates, sluices, trunks, pipes, bulkheads, piers, flumes, abutments and other works appurtenant thereto, as may be proper or useful for the purpose of the development of water power and of electrical power and energy therefrom, at such point or points upon or adjacent to the south shore of the St. Lawrence river, near Long Sault island or Barnhart's island, and upon the said islands, or either of them, and between said islands, and between said islands or either of them and the shores of the said river and Sheik's island (but not across the international boundary line unless consented to by the Dominion of Canada), as may be selected by said corporation, and also in and upon so much of the said river and the bed thereof as lies to the south of the international boundary line, at or near Long Sault island or Barnhart's island, either independently or in connection with like works now erected, or to be erected, in so much of said river and the bed thereof as lies to the north or Canadian side of said international boundary line, and upon and adjacent to the northerly shore of said river ; and to erect, construct, maintain, operate and use a power-house or power-houses, and conductors, cables, wires, insulators and other appliances in connection with the said works for the development of electrical power and energy ; and also to take and use the waters of said river at and above the points of location of said works heretofore authorized."

Stronger or more comprehensive or more definite language could not be used by the Legislature in conferring upon the company the right, power and privilege of controlling, for the

purpose of electrical power and energy, the waters of the St. Lawrence river at this point.

It might be argued, were the company limited to the use and development of the water power in and about the Long Sault island, that the privilege granted is not exclusive, but when it is considered that the company is given the right to develop water-power, at and above said place, the conclusion is inevitable that an exclusive privilege is granted, the limitations of which, in respect to location, are not defined, and may be asserted by the company to prevent all others from enjoying a similar privilege, not only at but above Long Sault island. How far above is not provided.

Authority is likewise conferred upon the corporation to erect all structures that it may deem proper or useful for any of the purposes described, at any points on the south shore or the north shore of the St. Lawrence river, upon any of the three islands named, or between the islands or in the bed of the river, either independently or in connection with like works now erected, or to be erected, in so much of said river and the bed thereof as lies to the north or Canadian side of said international boundary line, and upon and adjacent to the northerly shore of said river.

The act, therefore, not only grants to the corporation the exclusive right to develop and utilize all the water-power in and around Long Sault island, but also contemplates a more comprehensive, general and exclusive control of the waters of the St. Lawrence river at and near that vicinity, by constructing, independently or in connection with works at present existing or to be hereafter constructed on the Canadian side of the river. If the Long Sault Development Company is able, either through connections with a company or companies on the Canadian side, or by independent action, to obtain a similar grant of power on the Canadian side, there can be little question about the exclusive nature of the privileges and power it would thereby be permitted to exercise.

In addition to all this, it is important to note that the power granted is perpetual.

In view of the language above quoted and in the light of all of the facts at hand, the conclusion seems irresistible that the Legislature of 1907 intended and endeavored to grant to the Long Sault Development Company the exclusive right, either

independently or in connection with other corporation or corporations, to control all of the water-power that could be generated at that place in the St. Lawrence river and within a vague and undefined area " above that point," not only for the present generation, but in perpetuity.

Under this grant, if valid, succeeding Legislatures are prevented from granting privileges to any individual or corporation to utilize any of the water-power at the Long Sault rapids. It may also be claimed by the Long Sault Development Company that, because of its right to utilize the water above Long Sault island, no grant can be made by the Legislature, at least within a reasonable distance above the point in question, without impairing the charter of the Long Sault Development Company.

The company might also maintain that any structure hereafter authorized, above or below the location in question, which would in any wise affect the hydraulic head or lessen in any degree the efficiency of any of the structures of the Long Sault Development Company, would financially damage, and thereby impair, the exclusive rights, powers and privileges which the Long Sault Development Company received from the Legislature.

I believe that section 18 of article III of the Constitution was adopted for the very purpose of preventing such grants as this. At the time when this amendment was adopted, in 1874, nearly all of the available power sites within the State had been granted by the Legislature by special acts, with scarcely any revenue to the State.

The preservation to future generations of the water-power not theretofore granted, and which was practically located in the two border streams, the Niagara and the St. Lawrence, was a vital, essential and important duty. By section 18 of article III the people undertook to put an end to the granting of these exclusive privileges, and it is not unreasonable that they had in mind the undeveloped water-power of these two great streams. In any event, it was plainly declared in that provision that no exclusive privilege, immunity or franchise should be thereafter granted by the Legislature.

The charter in question plainly violates this provision, when we consider the causes that led to the adoption of, and the purpose sought to be obtained by this amendment.

There are many decisions of the courts interpreting this language of the Constitution, but none that I have been able to find which determine this question contrary to the conclusion which I have reached.

The terms of the Constitution are so plain, simple and comprehensive as to leave little room for construction. Nothing can be added to or taken from the language employed to make more plain the object aimed at. That object, as provided by the language of the provision, and as uniformly interpreted by the courts, is twofold: 1. To prevent monopoly; 2. To leave open competition.

Keeping these objects in view, there is to my mind little difficulty in applying the constitutional mandate to any given state of facts.

It is urged, upon the authority of Matter of Application of Union Ferry Company, 98 N. Y., 139, that a privilege, immunity or franchise is not exclusive within this provision of the Constitution, which does not, by its terms, prohibit the enjoyment of a similar privilege, immunity or franchise by someone other than the grantee. This is founded upon the language of the court in that case, to be found at page 153, which is as follows:

> "The exclusiveness prohibited is one which is created by the terms of the grant, not that which results from the nature of the property or right granted."

In that case the court was considering an act of the Legislature passed in 1882, entitled "An act to provide additional ferry slips and facilities in New York city for the ferries running between Whitehall street in the city of New York and Brooklyn." At page 148 the court said:

> "The whole frame and context of the act are consistent with the view that its objects was not to grant any privilege or franchise to the Union Ferry Company as a corporation, but as stated in the title of the act, to add to the ferry slips and facilities of the particular ferry which the company named was, at the time, operating."

The court further held, in sustaining the constitutionality of that act, that the additional facilities granted by the act would increase the capacity, not only of the grantee, but of all future lessees of the ferry, to meet the wants of the public, and that those increased facilities would be enjoyed by the grantee only under its lease from the city, and would terminate with the lease and pass to succeeding lessees, and that the property could not be used for any purpose except the exercise of the ferry franchise granted by the city, and in whose hands that franchise might be from time to time.

The court placed particular emphasis upon the fact that the privilege was not exclusive in respect to the character of the rights granted, nor indefinite in respect to the time of its enjoyment, and pointed out as exempting the statute from the constitutional inhibition, that the right granted, even while enjoyed by the Union Ferry Company could also be enjoyed by other companies and that the termination of the lease of the Union Ferry Company, the particular right granted to that company would pass to its lessee.

The facts of this case, it will be seen, immediately take it outside of the facts in the Long Sault case. The reasoning of the court in the Union Ferry Company case is not antagonistic to the contention that an exclusive privilege was granted to the Long Sault Development Company.

At page 151 the court cites cases of exclusive privileges condemned by this provision of the Constitution, among them the Cayuga Bridge Company v. Magee, 2 Paige, 116, in which case the charter of the Cayuga Bridge Company provided that it should not be lawful to erect any bridge or establish any ferry within three miles of the place where the bridge of the company should be erected, or to cross the river within three miles of the bridge without paying toll.

If we apply that doctrine to this case it condemns the charter. While the act does not expressly provide that no other company shall enjoy the privileges of the Long Sault Development Company within the area covered by the grant, yet the terms of the grant itself make it impossible that any other grant could be made by the State, or that any other company or any other individual, even the present riparian owners, could utilize the water for power purposes in that portion of the river.

I can see no distinction in principle between the provisions of an act of the Legislature which expressly provide that there shall be no competition within a given area, and the provisions of an act which makes it impossible that there should be. To hold that a different principle applies is to give an absurd construction to this most vital constitutional principle. Certain it is that the Union Ferry Company case is not authority for any such contention.

That case further cites, as an instance of an exclusive privilege, the decision of the Court in Mohawk Bridge Company vs. U. & S. R. R. Co., 6 Paige, 554. In that case the Mohawk Bridge Company received a charter to cross the Mohawk. The charter prohibited ferries crossing the river one mile above and one mile below.

Suppose in that case the Legislature, instead of providing that no other ferries should cross one mile above or one mile below, had made a grant to the Mohawk Bridge Company of the waters of the Mohawk and the bed of the stream, one mile above and one mile below. It is plain that such a grant would as effectively prevent other ferries from crossing within that area as if the statute expressly so provided.

I am well aware that, in the Union Ferry Company case, the Court of Appeals announced the principle that the right granted is not exclusive simply because it is impossible that any other person or corporation should enjoy that right, holding that, where it is important to the public interest that a privilege should be exercised by someone, the State must necessarily have authority to select the grantees, and that in such a case the exclusiveness is not produced by the grant, but results from the nature of the thing granted.

That doctrine cannot be so extended as to protect a grant which, although in terms is not exclusive, yet in addition to the privilege granted, grants other rights and privileges and properties which, upon the face of the act itself, make the privilege exclusive.

The court instances, as supporting this construction, grants of charters to toll bridge companies, grants of lands to railroad companies for depots, car-yards, etc. These rights, of course, are to a certain extent exclusive, but the grant of a right to build a toll bridge is based upon an obligation on the part of the company to serve the public by improving the

highway over which toll is taken. The right granted is in return for a public service rendered, while the rights granted to railroad companies to acquire depots, car-yards, etc., are necessary for the enjoyment of the franchise given to the companies, and that brings the case within an entirely different principle. In both these cases the use is a public one, and essential for the purpose of enjoying the charter granted by the State, and it is within the power of the Legislature to determine the necessity of the grant, and when it so determines, keeping within the line so clearly marked out by the court in the Union Ferry Company case, the grant is not violative of the Constitution.

The grant made to the Long Sault Development Company is not within the protection of these principles. It is exclusive within a certain undefined area. The powers granted are not in the interest of the public, and the important ones, such as the grant of the title to the bed of the river, are not essential to the enjoyment of the privilege of developing a water power and electrical energy. It prevents competition; it creates a monopoly in as clear and emphatic terms as could possibly be used by the Legislature.

I think it is clear, therefore, that it violates section 18 of article III of the Constitution of the State of New York.

THE ACT IN QUESTION VIOLATES SECTION 7 OF ARTICLE VII OF THE STATE CONSTITUTION, WHICH PROVIDES THAT THE LANDS OF THE STATE NOW OWNED OR HEREAFTER ACQUIRED, CONSTITUTING THE FOREST PRESERVE, AS NOW FIXED BY LAW, SHALL BE FOREVER KEPT AS WILD FOREST LANDS AND SHALL NOT BE LEASED, SOLD OR EXCHANGED OR TAKEN BY ANY CORPORATION, PUBLIC OR PRIVATE.

The bed of the St. Lawrence river is within the boundaries of the county of St. Lawrence. Chapter 332 of the Laws of 1893 (article VI, chapter 43, of the General Laws) provides:

> "Section 100, Forest Preserve. The forest preserve shall include the lands now owned or hereafter acquired by the state within the counties of * * * St. Lawrence * * * except

"1. Lands within the limits of any village or city and

"2. Lands, not wild lands, acquired by the state on foreclosure of mortgages made to the commissioners for loaning certain moneys of the United States usually called the United States deposit fund."

This statute was in force when the present constitution was adopted, when went into effect January 1, 1895, and contained the following clause:

"Article VII., Section 7. The lands of the State, now owned or hereafter acquired, constituting the forest preserve as now fixed by law, shall be forever kept as wild forest lands. They shall not be leased, sold or exchanged, or be taken by any corporation, public or private, nor shall the timber thereon be sold, removed or destroyed."

This provision of the Constitution read in connection with the provisions of the statute then in force leads inevitably to the conclusion that the lands in question are within the forest preserve and may not be alienated. The Court of Appeals in People vs. Fisher, 190 N. Y., 480, in considering what are forest preserve lands uses the following language:

"The language of the statute thus specifying the lands which are included within the forest preserve is clear and definite and does not in itself require construction. Its plain and positive language is made even more certain by the fact that some exceptions are stated therein."

The bed of the St. Lawrence river covered by the grant in question, being within the county of St. Lawrence and the State of New York is land owned by the State, constituting the Forest Preserve as defined by chapter 332 of the Laws of 1893.

There is no dispute that the land in question is so located, otherwise the Legislature of the State of New York could not grant title to these lands, as it undertook to do in the grant to the Long Sault Development Company.

My attention has been called to the very able brief of Henry W. Taft, Esq., in respect to the constitutionality of the charter of the Long Sault Development Company in which he argues at length, and with much force, that the lands in question were not intended to be included within the definition of the Forest Preserve, and therefore, are not within the inhibition of article VII. of section 7 of the Constitution.

I am unable to follow his reasoning and to give the language of the statute and the language of the Constitution any other than its plain and natural meaning. Nothing is left open for construction. I do not see how the statute defining the Forest Preserve could use more apt language in including the waters under the St. Lawrence river than it has used; nor how the constitutional convention could have more clearly expressed the policy of the State against alienating these lands.

THE ACT OF 1907 IS A PRIVATE BILL WHICH EMBRACES MORE THAN ONE SUBJECT AND IS DEFECTIVE AND ERRONEOUS IN ITS TITLE.

Article III., section 16, of the State Constitution provides that:

> "No private or local bill, which may be passed by the Legislature, shall embrace more than one subject, and that shall be expressed in the title."

The subjects embraced in the bill in question are as follows:

1. The creation of the corporation.
2. The construction, maintenance and operation of construction at or near Long Sault island.
3. The development of power from the waters of the St. Lawrence.
4. Constructing and maintaining a bridge.
5. The manufacturing of commodities.
6. The levying and taking of tolls.
7. The erection of transmission appliances.
8. The granting of the title to the bed of the St. Lawrence river to the corporation.

9. The creation of an exclusive right in perpetuity, to the use of all the water power in Long Sault Rapids.

10. The provision for alleged reasonable and proper remuneration to the State for such exclusive privileges.

Members of the Legislature from an examination of the title of this bill would not expect to find such extraordinary and exclusive grants as contained therein. The title of the bill does not indicate that the right to take toll is given to the company ; nor that the title to the bed of the St. Lawrence river is to be conveyed to the corporation. Development of water power in the river is readily accomplished without an appropriation or occupancy of the bed of the stream. The title of the bill does not indicate that the charter granted is perpetual. The same criticism applies in respect to the other provisions of the bill pointed out above.

The Court of Appeals in Coxe vs. The State, 144 N. Y., 396, declared unconstitutional, as violative of the provisions of the Constitution we are here considering, an act entitled: "An act to authorize the drainage of marsh lands" which granted privileges of an important character ; constituted a corporation, to which it gave power to reclaim and drain, from time to time, wet or overflowed lands and tide-water marshes on or adjacent to Staten Island and Long Island. Power was also given to enter upon all lands and waters for the purpose of making surveys and to use and own the right and title of the State in and to all the lands under water that may lie within or between said dykes and the present shore line, upon the payment to the Treasurer of the State of such sum of money as should be determined by a commission to be appointed by the Governor, to be a fair value of such lands under water and belonging to the State. The Court of Appeals said at page 408, in speaking of this :

> "It created a private corporation and its operations affected four counties in the state. The subjects embraced in it were the creation of the corporation ; the authority to drain and reclaim tide-water marsh lands ; to levy and collect assessments ; to exercise the power of eminent domain and grant of lands belonging to the state. We have seen that the purpose of the act, as expressed in the title, was the authority to 'drain marsh

lands.' Without inquiring whether any of these subjects are germane to, or so connected with the one expressed in the title as to escape the objection, it is quite clear that no citizen or member of the legislature would expect to find such an extraordinary grant from the state of lands under water in the body of a bill with such a title, and that is a fair test of the question."

The act of the Legislature condemned by the court in the above case was not more clearly violative of the provision of the Constitution under consideration than the act incorporating the Long Sault Development Company. Nothing in the title, as I have before stated, indicates that the company is to become the owner of land under water ; is to be permitted, in connection with other companies or acting independently, to bridge the St. Lawrence at that point ; to have exclusive control in perpetuity of the waters in the vicinity of Long Sault island and above and below it ; to charge toll, and to do the other numerous acts which, by the terms of the statute, it is permitted to do. For instance, the heading provides that one of the purposes of the act is " to improve navigation in the St. Lawrence," while there is nothing in the act to require the company to improve navigation, or to do anything more than is necessary to accomplish the purposes of its corporate existence, provided the navigation of the St. Lawrence is not injured. Many affirmative acts are to be performed by the company, every one in aid of its corporate purposes, not one for the improvement of navigation.

I believe, therefore, that this bill violates section 16 of article III of the Constitution of the State.

THE ACT IS INVALID AND INOPERATIVE SO FAR AS IT PROVIDES FOR THE ALIENATION BY THE STATE OF TITLE TO THE LANDS IN THE BED OF THE ST. LAWRENCE.

I think it is within the spirit of the resolution that I should also call the attention of your honorable body to the fact that the act in question is in excess of the power of the Legislature—in undertaking to divest the people of the State of the title to the lands under the St. Lawrence.

The act in question provides that after Congress shall

authorize the construction of the dams, locks and canals authorized by the act, and after the payment by said corporation into the treasury of the State of the fixed sum of $10,000, the Commissioners of the Land Office shall, upon application of said corporation, grant unto it the title and interest of the people of the State in and to the lands under the waters of the St. Lawrence river, to be covered or occupied by said works and locks and power houses, etc.

Provision is herein made for the complete surrendering of the title of the people of the State to the company, upon its complying with the terms of the act. This, neither the Legislature nor the Board of Land Commissioners has power to do.

THE TITLE OF THE STATE OF NEW YORK TO LANDS UNDER NAVIGABLE WATERS IS A SOVEREIGN RIGHT RATHER THAN A PROPRIETARY TITLE.

The State holds such lands in trust for the benefit of the public and that trust the State is powerless to divest itself of. This doctrine has been clearly announced whenever the question has been before the courts, both in State and in federal tribunals, and is not open to doubt. In the case of Coxe vs. The State, 144 N. Y.. 396, a case very similar to this, the court announced this principle in the following language:

> "The question is governed in this state by the rules of common law, modified in some respects by statute and adapted by the courts to such changes of conditions as existed here. That the dominion and ownership of such lands (under navigable streams) is in the sovereign for the benefit of the public has long been settled. Such dominion and ownership of property generally implies the power of absolute disposition, but with respect to the land under navigable or tide waters an important limitation has been engrafted upon this power from the nature of the title. The title of the state to the sea-coast and the shores of tidal rivers is different from the fee simple which an individual holds to an estate in lands. It is not a proprietary, but a sovereign right, and it has been frequently said that a trust is engrafted upon this title for the benefit of the public of which the state is powerless to divest itself."

The same doctrine is announced in People vs. N. Y. & S. I. Ferry Co., 68 N. Y., 71, and numerous other cases.

The United States Supreme Court states the same doctrine in Illinois Central R. R. Co. vs. Illinois, 146 U. S., 387. The court was there considering the validity of an act of the Illinois State Legislature, repealing a former act of that Legislature, which former act undertook to grant to the Illinois Central Railroad Company certain lands under the waters of Lake Michigan. Upon that point the court said:

> "The State holds the title to the lands under the navigable waters in trust for the people of the State that they may enjoy the navigation of the waters, carry on commerce over and have liberty of fishing therein, freed from the obstruction or interference of private parties. * * * The control of the State for the purposes of the trust can never be lost except as to such parcels as are used in promoting the interests of the public thereon or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining. * * *
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> "The State can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them, so as to leave them entirely under the use and control of private parties except in the instance of parcels mentioned for the improvement of the navigation and use of the waters, or when parcels can be disposed of without impairment of the public interest in what remains, than it can abdicate its police powers in the administration of government and the preservation of the peace."

There are numerous other cases in the United States court holding the same principle.

The title to this land is not necessary for the enjoyment by the company of all of the power incident to the development of water and electrical power at that point. It is not a grant for any public use or in which the public at large is interested, or by which the public is benefited. It clearly, therefore, contravenes the very nature of the State's sovereign control in this respect.

It may be argued that this is not important at present, in that it does not arise until Congress has acted; and also, that the powers granted to the company, being capable of full enjoyment without the grant of the title to the bed of the stream, that, therefore, to that extent the act may be sustained. As the court said in the Coxe case:

> "The various provisions of the act are so mingled together and dependent upon each other, that it is not clear that any of them can stand independently."

I believe, therefore, that this act should be condemned also, because of the provision which provides for the grant of title in the company of the bed of the St. Lawrence river at the point in question.

I believe, also, that this grant which is in excess of the power of the Legislature does not constitute an obligation on the part of the State toward the company, which is beyond the power of revocation by a subsequent Legislature.

The Remedy.

THE RESOLUTION FURTHER REQUESTS AN OPINION WHETHER OR NOT ANY PRESENT ACTION OR PROCEEDINGS MAY BE BROUGHT BY THE STATE TO ASCERTAIN JUDICIALLY WHETHER THE ACT IN QUESTION CONTRAVENES THE CONSTITUTION.

The grant made is ineffective until Congress shall authorize the construction of the dams, locks and canals authorized by the act. This is conceded by the act itself and is necessarily so, for the reason that the St. Lawrence is a national boundary, is a navigable river, and is, aside from regulation by treaty between this government and Canada, subject to control for purposes of navigation and military defense by the United States government and Canada to the extent of their respective ownerships. In other words, the federal control of the St. Lawrence river to the national boundary line is paramount to the control by the State for the purposes of navigation and military defense only. I believe it to be the law that the State cannot make a grant of a navigable river except subject to this paramount right of the federal government, which

right can only be enjoyed for the purpose of navigation and military defense.

Until, therefore, the Federal government, in conjunction with the Canadian government, or independently, shall recognize this grant as not interfering with the Federal use and control of the waters of the river at this point, the grant does not become effective. No legal proceedings, therefore, are necessary and it is not clear that any can be maintained in the courts to determine the constitutionality of that grant, especially as no power or privilege can be exercised by the grantee concededly until the Federal government, through Congress, has authorized the construction of dams, locks and canals as authorized by the act. I believe, however, that the Legislature has power in this case either to repeal the act or to direct the Attorney-General to bring an action to procure a judgment vacating and annulling the act of incorporation. The latter power of the Legislature can be exercised only if the Legislature reaches the conclusion that the act was procured by fraudulent suggestion or the concealment of a material fact made by or with the knowledge and consent of the persons, or any of them, incorporated (Section 130, General Corporation Law).

The power of the Legislature to repeal an act passed by a former Legislature, when deemed in conflict with the Constitution, I think is unquestioned. It has been exercised in the past by the Legislature with the approval of the court. Chapter 257 of the Laws of 1875 repealed a grant of land under water made by a previous Legislature. This act was before the court in Coxe vs. The State, 144 N. Y., 391. At page 403 the court discusses the terms of the repealing act and assumes that it was within the legislative power. In that case no question was made even by the corporation affected of the power of the Legislature to repeal the grant. In Illinois Central Railroad Company against Illinois, 146 U. S. Reports, 387, the United States Supreme Court held valid and effective an act of the Legislature of the State of Illinois repealing an act of a former Legislature undertaking to grant to the Illinois Central Railroad Company the right and title of the State of Illinois in and to the submerged lands constituting the bed of Lake Michigan and lying east of the tracks and breakwater of the Illinois Central Rail-

road for the distance of one mile. The court in that case held the principle that is contended for in this opinion, that this grant exceeded the power of the Legislature in that the State could not alienate to a corporation its ownership and control of lands under navigable waters but held them in trust for the people, and that to that extent the act of the Legislature was invalid and the repealing act was valid and effective.

Conclusion.

It is my opinion, therefore, that the powers and privileges granted the Long Sault Development Company by chapter 355 of the Laws of 1907 was an invalid and unauthorized grant for the reasons:

1. That the act in question is unconstitutional in that it contravenes section 18 of article III of the State Constitution, which provides that the Legislature shall not pass a private or local bill granting to any private corporation, association or individual any exclusive privilege, immunity or franchise whatever. This bill is private and local and grants an exclusive privilege, as contemplated by section 18 of article III of the Constitution.

2. It violates section 7 of article VII of the State Constitution, which provides that the lands of the State now owned or hereafter acquired, constituting the Forest Preserve, as now fixed by law, shall be forever kept as wild forest lands, and shall not be leased, sold or exchanged, or taken by any corporation, public or private.

The bed of the St. Lawrence river, which, by the act in question, is directed to be conveyed to the Long Sault Development Company, is owned by the State and was so owned at the time the provision of the Constitution was adopted, and was included within the Forest Preserve, as defined by section 100 of chapter 332 of the Laws of 1893, describing the lands included within the State Forest Preserve.

3. The act in question is a private bill and embraces more than one subject, and is, therefore, in violation of article III, section 16, of the State Constitution, which provides that no private or local bill which may be passed by the Legislature

shall embrace more than one subject, and that shall be expressed in its title.

4. The act is invalid as being in excess of the powers of the Legislature, in that it provides for the alienation by the State to the Long Sault Development Company of title to the lands in the bed of the St. Lawrence river. The title of the State in these lands is a sovereign right, rather than a proprietary title. It is inconsistent with that right, which must be exercised for the benefit of the whole people, that the title to the bed of a navigable stream should be granted in fee to a private corporation.

I do not deem it within the scope of the resolution that I should call the attention of your honorable body to the great disparity between the value of the rights and privileges undertaken to be granted to the Long Sault Development Company, and the revenue therefrom reserved to the State. While that is not the least striking provision of this most remarkable grant, yet it is a question of policy and of economy which it is competent for the Legislature to determine, and is not, I deem it, a question upon which the Legislature desires or needs my opinion.

All of which is respectfully submitted,

THOMAS CARMODY,
Attorney-General.

To the Honorable, the Senate of the State of New York.
Dated, December 30, 1912.

APPENDIX B.

STATE OF NEW YORK,

EXECUTIVE CHAMBER,

ALBANY, January 13, 1913.

TO THE LEGISLATURE:

In my recent Message to your Honorable body I recommended for your careful consideration, the conservation of the natural resources of the State, and their development and utilization for the benfit of all the people.

We are the trustees of future generations. We must protect and preserve the rights of those who come after us. We should be true to our trust. This is the duty of the day, and the real solution of the problem of true conservation.

The State of New York, in my opinion, is now committed to the policy of conserving all of its natural resources, and particularly of developing our vast water powers, so that they may be of benefit to all the people of the State.

In this connection I desire to call your official attention to the unconstitutionality of a charter which was attempted to be granted by the Legislature of 1907 to the Long Sault Development Company by Chapter 355 of the Laws of 1907.

Pursuant to a resolution of the Senate of this State, the Attorney-General, after careful and exhaustive consideration, transmitted to the Senate on January 1, 1913, in the form of an opinion, his conclusions as to the validity of the said act.

Suffice it to say that I am fully in accord with the able opinion of the Attorney-General, which clearly demonstrates that the said act is unconstitutional and void for the following reasons:

1. That the act in question contravenes Section 18 of Article III of the State Constitution, which provides that the Legislature shall not pass a private or local bill, granting to any private corporation, association or individual any exclusive privilege, immunity or franchise whatever. This bill is private and local and grants an exclusive privilege, as contemplated by Section 18 of Article III of the Constitution.

2. It violates Section 7 of Article VII of the State Constitution, which provides that the lands of the State now owned or hereafter acquired, constituting the Forest Preserve as now fixed by law shall be forever kept as wild forest lands, and shall not be leased, sold or exchanged or taken by any corporation, public or private.

The bed of the St. Lawrence River, which, by the act in question, is directed to be conveyed to the Long Sault Development Company, is owned by the State and was so owned at the time the provision of the Constitution was adopted, and was included within the Forest Preserve, as defined by Section 100 of Chapter 332 of the Laws of 1893, describing the lands included within the State Forest Preserve.

3. The act in question is a private bill and embraces more than one subject, and is, therefore, in violation of Article III, Section 16, of the State Constitution which provides that no private or local bill which may be passed by the Legislature shall embrace more than one subject, and that shall be expressed in its title.

4. The act is invalid as being in excess of the powers of the Legislature, in that it provides for the alienation by the State to the Long Sault Development Company of title to the land in the bed of the St. Lawrence River. The title of the State in those lands is a sovereign right, rather than a proprietary title. It is inconsistent with that right, which must be exercised for the benefit of the whole people, that the title to the bed of a navigable stream should be granted in fee to a private corporation.

The Attorney-General, the State Conservation Commission, and myself are convinced that this act is void and unconstitutional and that the appropriate action to be taken by the Legislature at this time is to repeal the said act.

Let me say further that I am advised by the Comptroller that certain sums of money have been paid into the State treasury by the Long Sault Development Company, as required by certain terms of the said act. I respectfully suggest to your Honorable body that such sums should be repaid to the Long Sault Development Company, together with interest.

In regard to any valid and legal claims which the Long Sault Development Company may have against the State of

New York, by reason of the repeal by the Legislature of the said act, I suggest that the same be referred to the Board of Claims for its determination.

Not only is said act violative of the provisions of our State Constitution, but its provisions are in other respects improvident, unwise and indefensible, both from an industrial and an economical point of view.

The State Conservation Commission reports:

> "The vast power available at this place constitutes one of the State's greatest natural resources. The advances in the art of electrical transmission makes it economically feasible to use the same throughout the State. At present it is going to waste. It is for the interest of all that this power should be developed and utilized by the people and for the people. Cheap power will enlarge the use of electricity for domestic and commercial purposes; stimulate industry; increase our wealth and add to our population. Private interests should not be allowed to exploit and monopolize the same. The State should develop this power for the benefit of the ultimate consumer."

Investigations made by the engineers of the State Conservation Commission demonstrate, among other things, that a full economic development at the Long Sault Rapids will produce one million (1,000,000) horse-power, of which, by treaty arrangement with Canada, it is to be expected that New York will receive no less than one-half. It is hard to conceive of the vastness of five hundred thousand (500,000) horse-power, transmuted into electrical energy. It is nearly three-quarters of the sum total of all the water powers now developed in New York State, including that at Niagara. It is estimated to be more than sufficient to run one-third of all the industries of our State, which are now operated by steam power, exclusive of steam railways, but inclusive of electric railways. These two facts may help to show the importance of this vast power to the industrial welfare of our State.

This immense power, so valuable to our people, is at a transmission distance of 340 miles from New York City, or

about 40 miles nearer than Niagara Falls. It is only 180 miles from Syracuse and about the same distance from Albany Great strides are being made in improving mechanical contrivances for transmitting hydro-electric power under high tension, and recent inventions and improvements make it probable that in the near future such power can be carried and transmitted with industrial and economical efficiency over vast distances.

At present it is reported as practicable to transmit power from the Long Sault Rapids to New York City for steady, continuous loads much cheaper than such loads can now be carried with steam power. This will inevitably result in a great saving to the consumer, and be of inestimable value to the State.

In order that we secure for all our citizens the many and the lasting beneficial results of the proper development of our natural resources, particularly of our now unused water powers, in accordance with our constructive policy in these matters, to which our State now stands committed, I respectfully recommend that Chapter 355 of the Laws of 1907—the Long Sault Development Company's charter—be immediately repealed.

WM. SULZER.

APPENDIX C.

List of Grants made by the State of New York subsequent to the General Dam Act of 1813, authorizing the construction and maintenance of Dams by Corporations and Individuals:

Laws		River	Period of Grant	Terms of Grant Affecting Control of Navigation.
Year	Chap.			
1813	34	A creek	Unlimited	Consent of President and Directors of town corporation to be obtained before erection of dam.
	37	Susquehanna	10 Yrs.	Grantee shall permit improvements to navigation and maintain a lock, not obstructing navigation.
	49	Skenando Creek	Unlimited	None
	62	Cohocton Creek	"	Grantee to construct a lock to render passage of boats safe and not to divert water from J. I.'s Mill.
	71	Susquehanna	24 Yrs.	Grantee to maintain a lock not obstructing navigation.
	135	Susquehanna	Unlimited	Grantee to erect an apron for passage of all boats.
	148	Harlem	"	Dam to be built so as to admit passage of boats.
	168	Susquehanna	"	Grantee to provide an apron allowing navigation.
1814	137	Susquehanna	15 Yrs.	Grantee to maintain a lock not obstructing navigation.
1815	98	Oneida Creek	Unlimited	Grantee to maintain a lock allowing passage of boats.
	196	Canesteo	"	" " "
	203	Butternut Creek	"	Grantee to keep creek navigable
1816	73	Oneida Creek	"	Grantee to keep and repair a lock for safe passage of boats.
	123	Conhocton	"	Grantee to erect a lock for safe passage of boats.
	139	Limestone Creek	"	Grantee to make lock for passage of boats where creek is navigable.
	160	Neversink	25 yrs.	None
	193	Butternut Creek	Unlimited	Grantee to make a lock allowing passage of boats where creek is navigable.
1817	44	Canandaigua Outlet	"	Grantee to maintain a lock allowing passage of boats.
	45	Canandaigua Outlet	"	" " "
	169	Chenango	"	Apron to be maintained for passage of rafts. Not to impede navigation.

Laws Year	Laws Chap.	River	Period of Grant	Terms of Grant Affecting Control of Navigation.
1817	172	Canisteo	Unlimited	Grantee to maintain a lock for passage of boats.
	178	Susquehanna	15 Yrs.	" " "
1818	81	Conhocton Creek	Unlimited	Grantee to keep and repair a lock for safe passage of boats.
1820	73	Conhocton	"	Grantee to maintain a lock for passage of boats.
	114	Chenango	"	Grantee to maintain apron for passage of boats. Not to impede navigation.
	175	Canascroja Creek	"	Grantee to keep in repair lock for passage of boats.
1821	79	Outlet of lake in Summit	"	None
	105	Susquehanna	20 Yrs.	Grantee to allow no obstruction to navigation, and if improvements to navigation be deemed necessary, grantees shall permit same.
	155	Susquehanna	Unlimited	At least one-half of river to remain unobstructed by dam.
1822	86	Otselic Creek	"	Not to obstruct navigation
	259	Susquehanna	"	None
1823	145	Conhocton	"	Grantee to construct a lock allowing passage of boats.
	166	Susquehanna	20 Yrs.	No obstruction to passage of boats. Grantee to improve navigation by locks if deemed expedient.
	168	Genesee	Unlimited	Grantee to construct a lock to allow passage of boats at high water.
	266	Mohawk	"	None
1824	15	Canisteo	"	Grantee to erect a lock allowing passage of boats.
	119	Conhocton	"	" " "
	198	Oneida	"	Not to obstruct navigation.
	236	Tioga	"	Dam to admit safe passage and to be destroyed if navigation requires.
	315	Onandaga Creek	"	None
1826	21	Tioga	"	Grantee to construct an apron
	38	Conhocton	"	None
	79	Susquehanna	"	Not to obstruct free passage of boats.
	106	Tioga	"	Grantee to erect an apron or lock.
	127	Susquehanna	"	Not to impede or obstruct free passage of boats.
	155	Genesee	"	None
	156	Genesee	"	Grantee to erect an apron or lock, for passage of boats.
	208	Genesee	"	" " "
	217	Susquehanna	"	None
	234	Conhocton	"	Grantee to erect an apron or lock.

Laws Year	Laws Chap.	River	Period of Grant	Terms of Grant Affecting Control of Navigation.
1826	252	A creek between Eastchester & Pelham.	Unlimited	Grantee to build dam and grist mill within two years.
	281	Black	"	Grantees appointed Commissioners having control over the waters diverted.
	296	Lake George	21 Yrs.	Grantee to construct and sustain a wooden lock. Commissioners appointed to supervise.
1827	13	Conhocton	Unlimited	Grantee to erect and maintain an apron.
	14	Genesee	"	" " "
	17	Canisteo	"	Grantee to erect and maintain an apron. If lock is obstructed, act to be void.
	40	Tioga	"	Grantee to erect and maintain an apron. Commissioners may have dam removed, if navigation is obstructed.
	41	Tioga	"	" " "
	72	Canisteo	"	Grantee to make an apron or lock. If passage obstructed, grant to be void.
	88	Tioga	"	Grantee to make an apron or lock. Commissioners may destroy dam if navigation is obstructed.
	104	Genesee	"	Grantee to make an apron or lock.
	106	Genesee	"	" " "
	147	Onondaga	"	*Not* necessary for grantee to make canal or locks around dam.
	165	Tioga	"	Grantee to erect an apron or lock to allow passage of boats.
	168	Canisteo	"	" " "
	173	Schroon	"	Grantee to erect an apron for logs and lumber to pass over dam.
	192	Seneca	21 Yrs.	Lock need *not* be maintained unless Commissioners of Canal Board so require.
	284	Genesee	Unlimited	Grantee to construct an apron and a canal for navigation of boats.
	327	Outlet of Canadaraga Lake	"	None.
1829	19	Susquehanna	"	Not to injure navigation.
	44	Susquehanna	"	" " "
	87	Canisteo	"	Grantee te erect an apron or lock. If passage obstructed, grant to be void.
	117	Canisteo	"	" " "

Laws Year	Chap.	River	Period of Grant	Terms of Grant Affecting Control of Navigation.
1829	138	Tioughnioga	Unlimited	Grantee to maintain an apron or lock.
	142	Genesee	"	None.
	164	Tioga	"	Grantee to erect an apron or lock.
	168	Canisteo	"	" " " "
	301	Susquehanna	20 Yrs.	Time extended to maintain rolling dam.
	310	Susquehanna	Unlimited	Not to obstruct navigation.
1830	83	Oneida	"	Grantee to maintain a lock and good navigation.
	101	Susquehanna	"	Not to injure navigation and not to extend beyond the middle of the river.
	194	Tioughnioga	"	Grantee to construct an apron.
	254	Tonawanda Creek	"	Grantee to construct and keep in repair a lock.
1831	115	Chenango	"	Dam not to injure navigation of river.
	227	Susquehanna	"	" " " "
	290	Susquehanna	"	Previous act amended, directing grantee to alter dam to render passage of boats safe.
1832	41	Susquehanna	25 Yrs.	(Privileges under acts of 1804 and 1806 continued.)
	182	Genesee	Unlimited	Grantee to erect an apron or lock.
	199	Canisteo	"	Grantee to construct apron for passage of boats.
	245	Susquehanna	"	Grantee to erect an apron or lock. Court may require a sluice to be built.
1833	86	Genesee	"	Grantee to erect an apron or lock.
	105	Tioga	"	Grantee to erect an apron or lock. If passage obstructed, grant to be void.
	188	Genesee	"	" " " "
	202	Genesee	"	" " " "
	214	Mohawk	"	Canal Commissioners may direct lock to be erected for purpose of navigation, at any time.
1834	95	A creek in the township of Pelham	"	None.
	102	Susquehanna	"	Grantee to erect a sluiceway.
	164	Susquehanna	"	" " " "
	239	Conhocton	"	Grantee to erect an apron or lock when necessary.
	305	Ransom Creek	"	Grantee to erect a lock 1½ yrs. after grant.
1835	5	Canisteo	"	Grantee to erect an apron.
	20	Susquehanna	25 Years	None. (Privileges under act of April 4, 1811, continued.)

Laws Year	Laws Chap.	River	Period of Grant	Terms of Grant Affecting Control of Navigation.
1835	109	Genesee	Unlimited	Grantee to admit safe passage of boats.
	125	Susquehanna	25 Years	Grantee to maintain lock and not to obstruct navigation. (Privileges under act of March 19, 1813, continued.)
	213	Genesee	Unlimited	Grantee to maintain a boat lock.
	215	Big Salmon River	"	Grantee to attach a slope-apron to dam (repealed by Act of April 11, 1836).
1836	108	Chemung	"	Grantee to construct an apron or lock.
	212	Ellicott Creek	"	None.
	389	Chenango	"	Grantee to erect an apron if it becomes necessary to navigate river.
1837	131	Chemung	"	Grantee to erect an apron or lock.
	190	Hudson	"	None.
	226	Genesee	"	Grantee to make apron or lock.
1838	317	Genesee	"	" " " "
	324	Genesee	"	" " " "
1839	85	Hammond Creek	"	" " " "
1840	57	Conhocton	"	Grantee to erect an apron or chute.
	98	Canisteo	"	" " " "
	133	Schroon	"	" " " "
	134	Canisteo	"	" " " "
	148	Chemung	"	" " " "
1841	97	Canisteo	"	" " " "
1843	196	Genesee	"	" " " "
1846	321	Palmer's Brook	"	None.
1848	303	Mead's Creek	"	Grantee to maintain apron or chute.
1850	165	St. Lawrence	"	None.
	169	Conhocton	"	"
1853	583	Chemung	"	Grantee to maintain apron and lock.
1854	115	Any in county of St. Lawrence	"	None.
1855	200	Mohawk	"	"
	234	Canandaigua Lake	"	"
1882	137	Oak Orchard Creek	"	"
	406	Hudson	"	Superintendent of Public Works to have Control of Navigation.
1883	176	Hudson	"	Grantees not to affect the flow of river except as result of dam for manufacturing purposes.
1884	486	Mohawk	"	None
1889	474	Mohawk	"	"
1898	603	Roeliff-Jansens-Kil	50 Yrs. (Duration of Corp.)	"
	605	Genesee	Unlimited	Not to impair natural flow.

Laws		River.	Period of Grant	Terms of Grant Affecting Control of Navigation.
Year	Chap.			
1900	33	Hudson	Forever	None
	175	Hudson	"	"
	683	Hudson	"	"
1901	164	Hudson	"	"
	501	Mohawk	"	"
	669	Hudson	"	"
1902	539	Niagara	100 Yrs. (Duration of Corp.)	Not to impair or obstruct practical navigation of Niagara River.
	607	Lake Kiskatom	99 Yrs. (Duration of Corp.)	None.
1903	560	Racquette	"	"
	564	Genesee	Unlimited	"
1907	355	St. Lawrence	Perpetual (Duration of Corp.)	Not to impair or obstruct navigation, which is to be preserved in as good condition if not better than at time of grant.
1911	514	Susquehanna	50 Yrs. (Duration of Corp.)	None.

APPENDIX D.

By a general dam act passed in 1813 (Chapter 47) the legislature made separate grants to a number of individuals to erect dams in certain rivers declared by the act to be public highways. These grants were for a limited period and were made subject to certain restrictions designed to prevent any obstruction to navigation, which was to be free from the payment of tolls. From 1813 to 1840 the legislature passed more than 125 special acts granting to individuals the right to build dams in certain streams which were navigable or capable of being developed for navigation. Generally these grants were made subject to one or more of the following conditions, viz. : (*a*) That the Court could revoke the grant if the dam proved to be an inconvenience to the public ; (*b*) that the grant could be repealed without liability for damage or compensation to the grantee whenever the public interest might require ; and (*c*) that the act should become void if passage upon the stream was obstructed by the dam.

In over forty years, between 1840 and 1882, there were but few special acts granting the right to build dams. Since 1882, however, the legislature has passed about twenty special acts granting the right to certain water-power companies (and in a few cases to individuals) to erect dams across some of the larger streams of the State, such as the Hudson and Mohawk Rivers.

The provisions of these acts were different from those of the acts passed prior to 1840 in the following particulars, viz.: no right of repeal was reserved; there was no express condition that navigation was to be improved, in some cases it being provided that navigation should not be injured, in others the subject not being mentioned at all; generally there was no condition for the resumption by the State of control of navigation; in some cases the use of the land under the water covered by the dam and flooded by its erection was given to the grantee and in some cases the legal title was conveyed to it; and there was no limitation as to the time of enjoyment and in five cases the right was granted to maintain the dam "forever."

The dams constructed before 1840 were probably not of expensive or elaborate construction but were built and used to create water-power for the operation of saw mills and grist mills belonging to grantees owning the lands and riparian rights in the immediate vicinity. At that time the needs of navigation were not rapidly developing and the grantees were, therefore, not deterred by the limitations imposed by the legislature from making the expenditures necessarily involved. The companies receiving grants made since 1882, however, have been organized for the purpose of developing water-power to be converted into electrical energy for the operation of extensive modern manufacturing plants. Such enterprises involve the building at large expense of masonry or concrete dams and they would not be undertaken if the right to maintain the dams were to be made subject, at the will of the legislature, to termination without compensation. These circumstances perhaps explain the change of legislative policy since 1882.

By Chapter 234 of the Laws of 1898, certain individuals were constituted a corporation under the name of the Electric Water-power Company of Oneonta, Otsego County, for the

purpose of erecting and operating a " dam or series of dams " on the Susquehanna River, to be used for the development of " hydraulic and electrical power for manufacturing, heating, lighting and other purposes." The dams were authorized for the use of the " water of such river " and the Company was empowered to sell or lease the power developed. The Company was also authorized to acquire property by condemnation. No provision for the preservation or improvement of the Susquehanna River was contained in the Act.

By Chapter 683 of the Laws of 1900 the Hudson River Water Power Company, which had acquired the riparian rights along both banks of the Hudson River, was given the right to erect and forever maintain a dam " to such height as will fully utilize the fall of the said river, * * * and to forever flow back up said river from said dam when erected, to form and maintain the pond necessary to utilize said dam." It was further provided that " any interest of the State in the lands under the waters of said river that shall be covered by the said dam and works, or that shall be flooded by the erection of such dam, is hereby granted to said Company." The reservation was made that the Company should only have the right to use such water as it was entitled to divert as a riparian owner. The navigable character of the river was preserved by the provision that spillways should be provided for the floating of logs down the river " as the custom has heretofore existed among lumbermen on said Hudson River."

By Chapter 154 of the Laws of 1900, certain individuals were constituted a corporation under the name of the Lockport and Newfane Power and Water Supply Company for the purpose of generating and selling power, and supplying water to municipalities within the County of Niagara. By Section 4 of the Act, the Company was authorized to construct and maintain a dam across Eighteen Mile Creek " for the proper use of the water of such creek " in the development of power.

By Chapter 175 of the Laws of 1900, a dam constructed by the Hudson River Power Transmission Company across the Hudson River between Saratoga County and Rensselaer County was legalized and the Company was authorized " to flood back up said river so far as it owns the adjacent uplands or may have right to flowage thereon, for the purpose of maintaining the ponds formed by such dam ; and any interest of

the State in the lands under the waters of such river covered by said dam and the works connected therewith is hereby granted to said Company."

By Chapter 564 of the Laws of 1903, the Mt. Morris Waterpower Company was authorized to construct and maintain a dam across the Genesee River, not to exceed in height 35 feet above the present ordinary water surface of the river. This power was conferred "for the purpose of supplying water for sanitary and other uses and of developing power."

By Chapter 486 of the Laws of 1896, the St. Lawrence Power Company of Massena was authorized to develop power and construct a canal from the St. Lawrence, St. Lawrence County, into the Grass River and to construct the necessary dams, sluices, etc., in the St. Lawrence or Grass Rivers, for the purpose of said canal. It was provided that navigation was not to be obstructed. The right of condemnation was also given. It is to be noted in connection with this grant that it tended to affect the navigation in the St. Lawrence River at or about the Long Sault Rapids, and while provision was made in general terms that navigation was not to be obstructed, the power project was obviously the main purpose of the act.

APPENDIX E.

Convention Concerning the Boundary Waters between the United States and Canada, promulgated May 13th, 1910.

The Convention of 1909 recites that the High Contracting parties are "equally desirous to prevent disputes regarding the use of boundary waters." By the Preliminary Article it is provided as follows :

> "For the purposes of this treaty boundary waters are defined as the waters from main shore to main shore of the lakes and rivers connecting waterways, or the portions thereof, along which the international boundary between the United States and the Dominion of Canada passes * * *."

Article I. provides as follows :

> " The High Contracting Parties agree that the navigation of all navigable boundary waters shall forever continue free and open for the purposes of commerce to the inhabitants and to the ships, vessels, and boats of both countries equally, subject, however, to any laws and regulations of either country, within its own territory, not inconsistent with such privilege of free navigation and applying equally and without discrimination to the inhabitants, ships, vessels, and boats of both countries."

Article III. provides as follows :

> " It is agreed that, in addition to the uses, obstructions, and diversions heretofore permitted or hereafter provided for by special agreement between the Parties hereto, no further or other uses or obstructions or diversions, whether temporary or permanent, of boundary waters on either side of the line, affecting the natural level or flow of boundary waters on the other side of the line, shall be made except by authority of the United States or the Dominion of Canada within their respective jurisdictions and with the approval, as hereinafter provided, of a joint commission, to be known as the International Joint Commission.
>
> " The foregoing provisions are not intended to limit or interfere with the existing rights of the Government of the United States on the one side and the Government of the Dominion of Canada on the other, to undertake and carry on governmental works in boundary waters for the deepening of channels, the construction of breakwaters, the improvement of harbors, and other governmental works for the benefit of commerce and navigation, provided that such works are wholly on its own side of the line and do not materially affect the level or flow of the boundary waters on the other, nor are such provisions intended to interfere with the ordinary use of such waters for domestic and sanitary purposes."

By Article VIII. a Joint Commission provided for in Article VII. is given jurisdiction in respect of cases involving the use or obstruction or diversion of waters. Provision is made for the order of precedence which is to be observed in respect of the uses to which the waters are to be put, preference being given first to domestic and sanitary purposes, second, to "navigation, including the service of canals for the purposes of navigation," and, third, to the "uses for power and for irrigation purposes."

Finally it is provided as follows:

> "In cases involving the elevation of the natural level of waters on either side of the line as a result of the construction or maintenance on the other side of remedial or protective works or dams or other obstructions in boundary waters or in waters flowing therefrom or in waters below the boundary in rivers flowing across the boundary, the Commission shall require, as a condition of its approval thereof, that suitable and adequate provision, approved by it, be made for the protection and indemnity of all interests on the other side of the line which may be injured thereby."

APPENDIX F.

Following is a copy of the letter of President Roosevelt referred to on page 81 of the Brief:

THE WHITE HOUSE,
WASHINGTON, March 18, 1908.

SIR: Numerous bills granting water rights in conformity with the general act of June 21, 1906, have been introduced during the present session of Congress, and some of these have already passed. While the general act authorizes the limitation and restriction of water rights in the public interest, and would seem to warrant making a reasonable charge for the

benefits conferred, those bills which have come to my attention do not seem to guard the public interests adequately in these respects. The effect of granting privileges such as are conferred by these bills, as I said in a recent message, "taken together with rights already acquired under State laws, would be to give away properties of enormous value. Through lack of foresight we have formed the habit of granting without compensation extremely valuable rights, amounting to monopolies, on navigable streams and on the public domain. The repurchase at great expense of water rights thus carelessly given away without return has already begun in the East, and before long it will be necessary in the West also. No rights involving water power should be granted to any corporation in perpetuity, but only for a length of time sufficient to allow them to conduct their business profitably. A reasonable charge should, of course, be made for valuable rights and privileges which they obtain from the National Government. The values for which this charge is made will ultimately, through the natural growth and orderly development of our population and industries, reach enormous amounts. A fair share of the increase should be safe-guarded for the benefit of the people, from whose labor it springs. The proceeds thus secured, after the cost of administration and improvement has been met, should naturally be devoted to the development of our inland waterways." Accordingly, I have decided to sign no bills hereafter which do not provide specifically for the right to fix and make a charge and for a definite limitation in time of the rights conferred.

Sincerely, yours,

THEODORE ROOSEVELT.

Hon. WILLIAM P. FRYE,
Chairman Committee on Commerce, United States Senate.

The following is Senator Nelson's statement referred to at page 81 of the Brief:

> "Mr. President, since 1908 there has practically been an embargo upon the construction of dams over navigable waters in this country. Improvements have gone on where the right to build the dam had been ac-

quired before that time, but President Roosevelt on the 18th of March, 1908, sent a letter to the chairman of the Committee on Commerce, Senator Frye, stating that he would veto any water-power bill unless first it contained a limitation as to time ; that is, that some definite time should be fixed, and in the next place unless it provided for the payment of a royalty or toll to the Government of the United States.

" The Committee on Commerce of the Senate at that time had before it what was known as the James River Dam bill, providing for building a dam across the James River, in Stone County, Mo. After the committee received that letter from President Roosevelt it proceeded to consider the entire question, and the committee came to the unanimous conclusion that the assumption of President Roosevelt that the public should pay a royalty for the use of the water was unfounded and contrary to law. The Committee on Commerce reported the James River Dam bill unanimously without injecting into it the amendment that President Roosevelt insisted upon in his letter.

" The bill went to the House and there it was hung up, and from that day to this, with the exception of the Rainy River bill, which was referred to the other day, no bill authorizing the construction of a dam over navigable waters has been passed. If my recollection serves me correctly, we have passed several bills here in the Senate ; but those bills have been held up in the other House on the theory and contention that no right should be granted under special laws, that what we needed was a general law.

" There has been such an embargo, Mr. President, that it has operated as an actual stay on water-power construction."

APPENDIX G.

STATE OF NEW YORK,
OFFICE OF THE
CLERK OF THE SENATE,
Albany.

STATE OF NEW YORK, } ss.:
County of New York, }

I, PATRICK E. MCCABE, Clerk of the Senate of the State of New York, do hereby certify, that I have carefully compared the annexed copy of an extract from the Senate Journal for the year 1913, with reference to the bill No. 110, Print No., entitled "An Act Repealing chapter 355, Laws of 1907, by which the Long Sault Development Company was incorporated, and providing for the repayment of certain moneys paid by the company and appropriating $36,320 therefor," with the original thereof on file in my office, and that the same is a true and correct copy thereof, and of the whole thereof relative to said bill.

In Witness Whereof, I have hereunto set my hand,
[SEAL] and affixed the official seal of the Senate,
this 16th day December, 1913.

PATRICK E. MCCABE.

The Senate Bill, No. 110, Int. No. 108, entitled "An Act to repeal chapter Three hundred fifty-five of the laws of nineteen hundred and seven, entitled 'An Act to incorporate the Long Sault Development Company, and to authorize said company to construct and maintain dams, canals, power-houses and locks at or near Long Sault Island, for the purpose of improving the navigation of the Saint Lawrence river and developing power from the waters thereof, and to construct and maintain a bridge, and carry on the manufacture of commodities,' providing for the repayment to such company of certain moneys paid by it under such act and making an appropriation therefor," was read the third time.

The President put the question whether the Senate would agree to the final passage of said bill, the same having been printed and upon the desks of the members in its final form for three calendar legislative days, and it was decided in the affirmative, a majority of all the Senators elected voting in favor thereof, and three-fifths being present, as follows:

Aye: District 23, Mr. Blauvelt; 15, Mr. Boylan; 7, Mr. Carroll; 6, Mr. Carswell; 3, Mr. Cullen; 8, Mr. Duhamel; 33, Mr. Emerson; 12, Mr. Fitzgerald; 14, Mr. Foley; 22, Mr. Griffin; 32, Mr. Heacock; 24, Mr. Healy; 5, Mr. Heffernan; 17, Mr. Herrick; 13, Mr. McClelland; 29, Mr. McKnight; 48, Mr. Malone; 41, Mr. Murtaugh; 1, Mr. O'Keefe; 2, Mr. Patten; 36, Mr. Peckham; 18, Mr. Pollock; 49, Mr. Ramsperger; 19, Mr. Salant; 9, Mr. Sanner; 43, Mr. Seeley; 21, Mr. Stilwell; 10, Mr. Torborg; 4, Mr. Velte; 16, Mr. Wagner; 39, Mr. Wheeler; 31, Mr. White.

Nay: District 45, Mr. Argetsinger; 35, Mr. Brown; 44, Mr. Bussey; 34, Mr. Coats; 51, Mr. Godfrey; 46, Mr. Ormrod; 27, Mr. Palmer; 28, Mr. Sage; 25, Mr. Stivers; 47, Mr. Thompson; 30, Mr. Whitney; 42, Mr. Wilson.

Ayes, 32; Noes, 12.

ORDERED, that the Clerk deliver said bill to the Assembly and request their concurrence therein.

IN ASSEMBLY, MAY 2, 1913.

Mr. Speaker announced the special order being the senate bill (No. 110, Rec. No. 169) entitled "An act to repeal charter three hundred and fifty-five of the laws of nineteen hundred and seven, entitled 'An act to incorporate the Long Sault Development Company, and to authorize said company to construct and maintain dams, canals, powerhouses and locks at or near Long Sault island, for the purpose of improving navigation of the Saint Lawrence river and developing power from the waters thereof, and to construct and maintain a bridge, and carry on the manufacture of commodities,' providing for the repayment to such company of certain moneys

paid by it under such act and making an appropriation therefor."

Debate was had thereon.

On motion of Mr. Levy said bill was read the second time and ordered to a third reading.

Said bill was then read the third time, having been printed and upon the desks of the members in its final form at least three calendar legislative days prior to its final passage.

Mr. Speaker put the question whether the House would agree to the final passage of said bill, and it was determined in the affirmative, a majority of all the members elected to the Assembly voting in favor thereof, and three-fifths being present.

Those who voted in the affirmative were.

Messrs. Benninger, Bovie, Brewster, Burden, Burr, Bush, Carroll, Carver, Cole, Cotillo, Cronin, Daley, Dennen, Donohue, Dorst, Doty, Dox, Eisner, Evans, Fitzgerald, Gallup, Gathright, Geoghan, Geyer, Gillen, Goldberg, Gurnett, Hammer, Hearn, Heyman, Hover, Hughes, Jackson, Jude, Kane, Kelly, J. A., Kelly, J. J., Kelly, J. D., Kenney, Kennedy, Kerrigan, Kiernan, Kornobis, Larrimer, Levy, Lewis, Madden, Maloney, McCullom, McDaniels, McElligott, McKee, McKeon, Monahan, O'Brien, Oxford, Patrie, Pullman, Robinson, Rozan, Schaap, Schifferdecker, Schwarz, Seely, J. L., Silverstein, Small, Squire, Sufrin, Sutphin, Telford, Taylor, F. J., Taylor, T. D., Tudor, Ulrich, Van Woert, Volk, Walker, Ward, Weil, Willard, Willmott, Yard.

Those who voted in the negative were:

Messrs. Adler, Baumes, Bradley, Edwards, Fuller, Grace, Hinman, Hopkins, Malone, Norton, Pappert, Phillips, Richardson, Schnirel, Seaker, Seelye, G. T.; Smith, J. A.; Smith, Myron; Sweet, Vert, Webb, Wood, Yale.

Ayes, 82.

Noes, 23.

ORDERED, That the Clerk return said bill to the senate with a message that the assembly have concurred in the passage of the same.

STATE OF NEW YORK,
County of Albany,
OFFICE OF THE CLERK OF
THE ASSEMBLY,
} ss.:

I, WILLIAM K. MANSFIELD, Journal Clerk of the Assembly, do hereby certify that I have compared the foregoing record of Proceedings of the Assembly of May second, 1913, relative to the bill therein set forth, with the original thereof as contained in the original official copy of the Journal of proceedings of the Assembly of said date and that the same is a true and correct transcript of said Journal of proceedings in so far as the same relates to said bill and of the whole thereof.

IN WITNESS WHEREOF I have hereunto set my hand this 16th day of December, 1913.

W. K. MANSFIELD,
Journal Clerk.

APPENDIX H.

GREENE COUNTY.

Liber 49, of Patents, page 295, executed February 27, 1897, granting the title to land under water to Charles Gorman for dock purposes.

Liber 49, page 297, executed October 11, 1897, Alonzo I. Powell and another, for dock purposes.

Liber 50, page 215, executed March 1, 1899, James E. Bronk, no purpose specified.

Liber 51, page 36, executed October 25, 1901, Peter A. Somers and another, for dock purposes.

Liber 51, page 49, executed April 16, 1902, Arthur C. Babson, for dock purposes.

Liber 51, page 75, executed September 29, 1902, Alsen's American Portland Cement Co., for dock purposes.

Liber 51, page 293, executed September 28, 1898, P. H. Doherty, no purpose specified.

Liber 54, page 60, executed May 15, 1905, Clifford Bonneville, for dock and canal purposes.

Liber 54, page 73, executed October 12, 1905, Whitehead Bros., for dock purposes.

Liber 54, page 78, executed November 21, 1905, Catskill Cement Co., for building purposes.

Liber 54, page 216, executed June 11, 1909, Seaboard Portland Cement Co., for dock and tramway purposes.

ULSTER COUNTY.

Liber 49 of Patents, page 7, executed September 4, 1895, to John J. Cooney and Patrick Farrell, for purposes of erecting a public dock or docks.

Liber 49, page 24, executed December 2, 1898, to J. Peter Leuffgen, for purposes of erecting a public dock or docks.

Liber 50, page 139, executed Dec. 7, 1897, to Frank M. Van Deusen and Harriet J. Van Deusen, for purposes of building a public dock or docks.

Liber 50, page 204, executed November 30, 1898, to James H. Duffie and Milo M. Wells, for purposes of building a public dock or docks.

Liber 50, page 224, executed June 8, 1899, to Mary E. Pulver, for purposes of building a public dock or docks.

Liber 51, page 3, executed April 15, 1900, to Charles N. Baker, for purposes of filling in land so conveyed and erecting thereon an ice-house and buildings and piers and docks and other structures of like nature.

Liber 51, page 13, executed March 23, 1901, to Martin E. Hendricks, for the purpose of erecting thereon a dock or buildings of a substantial character.

Liber 51, page 35, executed October 8, 1901, to The Order of the Holy Cross, for the purpose of erecting and maintaining a dock or buildings.

Liber 51, page 38, executed November 9, 1901, to John E. Lynch and Thomas Lynch, for the purpose of erecting and constructing bulkheads, docks and brickyards for the manufacture of brick.

Liber 54, page 29, executed June 16, 1904, to Thomas Dinan, for the purpose of filling in and erecting docks and other structures.

Liber 54, page 94, executed May 2, 1906, to the Ulster

Brick Company for the purpose of filling in and erecting docks and other structures.

Liber 54, page 135, executed March 18, 1907, to Marian Cormack, for the purpose of filling in and erecting docks.

Liber 54, page 200, executed December 21, 1908, to Archibald H. Smith and Julia M. Smith for the purpose of filling in and erecting bulkheads, brick-sheds, docks and other structures.

Liber 56, page 42, executed January 27, 1913, to Oliver H. Payne, for the purpose of filling in and erecting dock, boathouse and breakwater.

Liber 56, page 53, executed April 11, 1913, to Alvah S. Staples, for the purpose of filling in and erecting docks, brickyards and sheds.

SARATOGA COUNTY.

Liber 50 of Patents, page 195, executed August 20, 1898, granting title to land under water to Stillwater and Mechanicsville Railroad Company for bridge purposes.

WASHINGTON COUNTY.

Liber 49 of Patents, page 377, executed December 16, 1901, title to land under water to Greenwich and Johnsonville Railway Company for bridge purposes.

APR 12 1916
JAMES D. MAHER
CLERK

Supreme Court of the United States

OCTOBER TERM, 1915.

No. [redacted] 49

LONG SAULT DEVELOPMENT COMPANY, *Plaintiff in error,*

vs.

HOMER D. CALL (as Successor of John J. Kennedy), as Treasurer of the State of New York

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK

BRIEF FOR DEFENDANT IN ERROR

E. E. WOODBURY,
Attorney-General,
MERTON E. LEWIS,
C. T. DAWES,
Attorneys for Defendant in error.

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Supreme Court of the United States

OCTOBER TERM, 1915

No. 271

LONG SAULT DEVELOPMENT COMPANY, PLAINTIFF IN ERROR.

vs.

HOMER D. CALL (AS SUCCESSOR OF JOHN J. KENNEDY) AS TREASURER OF THE STATE OF NEW YORK.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK

BRIEF FOR DEFENDANT IN ERROR.

Preliminary Statement.

This action was brought here on a writ of error granted by Mr. Justice Pitney after judgment had been rendered in the Supreme Court

of the State of New York against the plaintiff in error upon a remittitur from the Court of Appeals of the State of New York, that being the highest court of law in said State. (Record, p. 62.)

The Court of Appeals of the State of New York (212 N. Y. 1) affirmed the order of the lower State courts which denied a writ of mandamus sought by the plaintiff in error to compel the State Treasurer to accept the payment of $25,000 due the State for the year 1912, from the Long Sault Development Company, plaintiff in error, as consideration for a franchise to use the waters of the St. Lawrence river at the Long Sault Rapids for power purposes, conferred by chapter 355 of the Laws of 1907. (Record, p. 22.) Refusal by the State Treasurer to accept the payment was based on the ground that the above statute, which was the company's charter, was unconstitutional, he having been so advised by the Attorney-General of the State.

Chapter 355 of the Laws of 1907 is entitled

"AN ACT TO INCORPORATE THE LONG SAULT DEVELOPMENT COMPANY, AND TO AUTHORIZE SAID COMPANY TO CONSTRUCT AND MAINTAIN DAMS, CANALS, POWER-HOUSES AND LOCKS AT OR NEAR LONG SAULT ISLAND, FOR THE PURPOSE OF IMPROVING THE NAVIGATION OF THE ST. LAWRENCE RIVER AND DEVELOPING POWER FROM THE WATERS THEREOF, AND TO CONSTRUCT AND MAINTAIN A BRIDGE, AND CARRY ON THE MANUFACTURE OF COMMODITIES."

After conferring corporate life and the usual powers of internal corporate management, the act grants to the company in section 3, the right

Reservoirs and Dams.

"to erect, construct, maintain, operate and use all such dam or dams, canal or canals, reservoir or reservoirs, gates, sluices, trunks, pipes, bulkheads, piers, flumes, abutments, and other works appurtenant thereto, as may be proper or useful for the purpose of the development of water power, and of electrical power and energy therefrom, at such point or points upon or adjacent to the south shore of the St. Lawrence river, near Long Sault island or Barnhart's island, and upon the said islands, or either of them, and between said islands or either of them and the shores of the said river and Sheik's island (but not across the international boundary line unless consented to by the Dominion of Canada), as may be selected by said corporation, and also in and upon so much of the said river and the bed thereof as lies to the south of the international boundary line, at or near Long Sault island or Barnhart's island, either independently or in connection with like works now erected, or to be erected, in so much of said river and the bed thereof as lies to the north or Canadian side of said international boundary line, and upon and adjacent to the northerly shore of said river;"

Power-Houses and Electrical Conductors.

"and to erect, construct, maintain, operate and use a power-house or power-houses, and conductors, cables, wires, insulators and other appliances in connection with the said works for the development of electrical power and energy;"

Use of Waters.

"and also to take and use the waters of said river at and above the points of location of said works heretofore authorized,"

Construction of Bridge.

"and to construct and maintain upon, over and in connection with said dam or dams and other works, a bridge or bridges across or partly across the St. Lawrence river, with the approaches thereto, for the use of foot passengers, animals and vehicles, and to charge reasonable rates of toll for passage thereon;"

Navigation.

"said corporation shall also erect and construct a lock or locks as may be required by the United States of America, and shall provide electrical power or energy for the maintenance, operation and use of said lock or locks, free of charge, and shall in all other respects perform, fulfill and abide by all and singular the conditions and provisions of this act, and also of any act of the congress of the United States relating thereto, and also upon condition that the rights hereby granted shall never be so used as to impair or obstruct the navigation of the Saint Lawrence river, but, on the contrary, that *such navigation shall be preserved in as good condition as, if not better than, the same is at present, regard being always had to the amount of the natural flow of water in said river, as affecting its navigability from time to time.*" (Italics are our own emphasis.)

Section 4 of the act provides that after the United States government shall have sanctioned the construction of the dams, locks and canals

authorized by section 3, and after payment by said corporation into the treasury of the State of the fixed sum of $10,000,

Conveyance of Lands Under Water.

"the Commissioners of the Land Office shall upon application of said corporation grant unto it the title and interest of the people of the State in and to lands under the waters of the Saint Lawrence river, to be covered or occupied by said works and locks and power-houses, provided, however, that any of the lands of the state which may be so conveyed to said corporation shall be forfeited and title thereto shall revert to the state unless the same are actually used by said corporation and covered by its dams, canals, reservoirs, gates, sluices, trunks, pipes, bulkheads, piers, flumes, abutments or other works appertaining thereto, or are necessary to the enjoyment for said purposes of any lands so used or covered, within fifteen years from the conveyance thereof by the commissioners of the land office to said corporation under authority of this act."

Consideration to the State.

"And in consideration of the conveyance so made under the authority of this act, as well as for the rights and privileges hereby granted the said corporation in addition to the payment aforesaid shall pay into the treasury of the state for the year nineteen hundred and ten the fixed sum of fifteen thousand dollars, and for the year nineteen hundred and eleven the fixed sum of twenty thousand dollars. For each year after nineteen hundred and eleven the said corporation shall pay at the following rates upon the average

> amount of electrical horse power generated during such year under the authority of this act, that is to say: Upon all amounts up to twenty-five thousand electrical horse power, at the rate of seventy-five cents per horse power; upon all amounts in excess of twenty-five thousand electrical horse power and up to one hundred thousand electrical horse power at the rate of fifty cents per horse power; upon all amounts in excess of one hundred thousand electrical horse power, at the rate of twenty-five cents per horse power. In case said corporation shall generate or develop water power as mechanical power without transmuting the same into electrical power, then for so much of said water power as shall be so generated or developed, payment shall be made at the above mentioned rates per mechanical horse power."

Payment of the annual sums due the State were to be made on or before February 1st of the following year. Should the company not generate power in any year after 1911 sufficient to return to the State $25,000,

> "then said corporation shall pay for such year the sum of twenty-five thousand dollars instead of the amount that would be payable at the rates aforesaid."

The Long Sault Development Company is a subsidiary company of the Aluminum Company of America, sometimes referred to as the Aluminum Trust, and owing to the opposition before Congress of the advocates of water power conservation for the benefit of the people, and to the protests of Canadian municipalities and public associations, the Long Sault company has not

been able to secure the passage of any of its bills (first introduced in 1907) containing the consent of the Federal government to the construction of the dams. [Reports of the International Waterways Commission, 3d, 4th, 5th and 6th Progress Reports of the United States Section; H. R. 25707, 59th Congress, 2d Session; Hearings on Malby bill, H. R. 14531, 61st Congress, 2d Session; Hearings on Young bill, H. R. 32219, 61st Congress, 3d Session; Report on same bill by River and Harbors Committee; Hearings on S. 10558, 61st Congress, 3d Session; H. R. 22950, 62d Congress, 2d Session.]

No power having yet been developed, there became due to the State on February 1, 1913, the sum of $25,000 for the year 1912, according to the last above-quoted provision of the act.

Immediately prior to February 1, 1913, or to be precise, on January 1, 1913, the Attorney-General, pursuant to a resolution of the State Senate (Record, p. 19), had rendered an opinion to that body holding the Long Sault Act unconstitutional. Acting under authority of that opinion and upon specific written advice to the same effect from the Attorney-General, the State Treasurer returned the company's check for $25,000, sent January 22, 1913, and refused also a personal tender of the money on January 27, 1913. (Record, pp. 29, 33.) Thereupon the Long Sault company applied to the court for a writ of mandamus to compel the State Treasurer to perform his statutory duty of receiving the $25,000 due under the provisions of the act.

The grounds of unconstitutionality of the Long Sault company's charter urged before the court

by the Attorney-General in opposition to the granting of the writ were briefly these:

(1) The Legislature cannot abdicate, as it has attempted to by this Act, its sovereign control over navigation and entrust the same to a private corporation.

(2) The Act grants an exclusive privilege to a private corporation in contravention of article III, section 18, of the State Constitution.

(3) The Act contravenes the prohibition against the alienation of State lands in the forest preserve. (Constitution, art. VII, § 7.)

(4) Its title is erroneous and deceptive. (Constitution, art. III, § 16.)

(5) The grant of lands under the waters of the St. Lawrence river to a private corporation is in excess of the powers of the Legislature, because the State holds the lands not by proprietary title but as sovereign in trust for the people.

The Special Term of the Supreme Court, without an opinion, denied the writ as a matter of law, *pro forma*, so as to expedite a hearing in the appellate courts. An appeal was immediately taken by the Long Sault company to the Appellate Division.

Before the Appellate Division had handed down its decision, the Legislature expressly repealed by chapter 452 of the Laws of 1913 (Record, p. 32), the Long Sault Act on the ground that it was unconstitutional, and conferred jurisdiction (chap. 453, Laws of 1913) upon the Board of Claims to hear any *alleged* claims of the Long Sault Development Company. Counsel again appeared, at the request of the Appellate Division, and made argument upon the effect of the

repealing act. The order of the Special Term, denying the writ, was thereafter affirmed. (Record, p. 38.)

The opinion of the Appellate Division, two of the five justices dissenting, will be found at page 40 of the Record. That court held the Long Sault company's charter constitutional, but refused the writ on the ground that the Legislature by the repealing act had appropriated under the State's power of eminent domain the franchises theretofore granted to the company, and had sent the company for its compensation to the Court of Claims. In other words the Appellate Division ruled that the Legislature was not successful in repealing the act on the ground that it violated the State Constitution, but, since in addition to stating the unconstitutional phases of the act as a reason for the repeal, the Legislature had attached a clause to the repealing act, section 4, providing that "an enumeration in this act of the grounds for said repeal shall not be deemed to qualify or impair the full force and effect of the repeal," and had further given the company a tribunal in which to present its claims, it resulted that the Legislature intended, in the event the unconstitutionality of the act was not judicially sustained, to recover these franchises nevertheless for the people by payment of their value to the company. In short, the Appellate Division held that the franchises were condemned.

From the decision of the Appellate Division the Long Sault company appealed to the Court of Appeals. The decision of the Appellate Division was there reversed and the charter de-

clared unconstitutional in an opinion written by Chief Justice Bartlett with whom five other judges concurred and but one dissented (212 N. Y. 1.) (Record, p. 67.) That part of the charter which provided that "navigation shall be preserved in as good condition as, if not better than, the same is at present" was held by the court to be in excess of the power of the Legislature, i. e. that the Legislature did not possess the constitutional right to convey away the State's control over navigation at that point to the extent attempted in the above grant to the Long Sault company, because the terms of that grant were so broad as to completely foreclose the exercise in the future of the sovereign power and duty of the State to improve navigation in the river. (Record, p. 70.)

On motion of the plaintiff in error the remittitur from the Court of Appeals was amended to show that the plaintiff in error had presented in that court a brief in which its counsel claimed that the charter of the Long Sault company constituted a contract between the State and the company, and that such contract had been impaired by the repealing act, contrary to the prohibition in the Fourteenth Amendment to the Constitution of the United States. (Record, p. 52.)

The State on that motion asserted and now asserts that no such Federal question exists.

POINT I

THERE IS NO FEDERAL QUESTION. THE COURT OF APPEALS OF THE STATE OF NEW YORK SIMPLY CONSTRUED THE STATE CONSTITUTION AND GAVE NO EFFECT WHATEVER TO THE REPEALING ACT CLAIMED BY THE PLAINTIFF IN ERROR TO HAVE IMPAIRED ITS CONTRACT WITH THE STATE. THE CHARTER HAD BEEN DECLARED UNCONSTITUTIONAL BY THE ATTORNEY-GENERAL, THE GOVERNOR AND THE CONSERVATION COMMISSION, AND THIS MANDAMUS PROCEEDING NOW BEFORE THIS COURT HAD BEEN INSTITUTED AND THE CHARTER DECLARED UNCONSTITUTIONAL BY THE SUPREME COURT OF THE STATE OF NEW YORK LONG BEFORE THE REPEALING ACT WAS PASSED.

Misgivings as to the constitutionality of the Long Sault charter had arisen immediately after its passage. The impression that the act was unconstitutional had gradually grown so general that the Legislature on or about March 29, 1912, sought the advice of the Attorney-General by a formal resolution requesting that officer's opinion on the constitutionality of the Long Sault Act. The Attorney-General was not to report forthwith, but was given ample time, almost a year, or until the convening of the next session at the

beginning of the year 1913 in which to prepare his opinion. The Legislature it may therefore be inferred did not intend to infringe upon any rights of the Long Sault company by repealing the charter, unless it became convinced that the charter act was unconstitutional and no such rights existed. (Record, p. 18.) The Attorney-General rendered his opinion to the Legislature on January 1, 1913. A message from the Governor on January 13, 1913, to the Legislature (p. 20) stated that he was fully in accord with the opinion of the Attorney-General and recommended the repeal of the charter, adding that " the Attorney-General, the State Conservation Commission and myself are convinced that the act is void and unconstitutional and that the *appropriate* action to be taken by the Legislature at this time is to repeal the said act." Nor was any summary step then taken by the Legislature, but the repeal bill introduced on January 13th remained before that body until May 2d, a period of four months, before it received the assent of both Houses. So that we are safe in assuming that the Legislature was honest in its statement in the repeal bill that it was repealing the charter only because the same would not stand the test of constitutionality. In other words there was no attempt or design to impair any contract. The Legislature merely felt called upon to rectify its excessive use of power and to make its conduct before the people accord with constitutional limitations. Repealing acts for this purpose are quite proper. (*Illinois Central Rd.* v. *Illinois*, 146 U. S. 387; *Coxe* v. *State*, 144 N. Y. 391.)

In defeating the plaintiff in error the courts of the State of New York did not rely in any de-

gree upon the repealing act. As we have stated, this proceeding for mandamus was brought and was decided adversely to the plaintiff in error by the Supreme Court before the repealing act was passed (Record, p. 67), and the Court of Appeals which this writ of error reviews barely mentions in its opinion that such an act was passed. The whole reasoning of that court proceeds along the line of the unconstitutionality of the original charter, the court construing the charter in the light of the State Constitution without any consideration at all of the force of the repealing act. The Court of Appeals determined that the navigation grant was in excess of the power of the Legislature, and decided the case on that single ground. There was no effort or design to evade the repealing act because no evasion was necessary. *The proceeding had come into court unaffected by the repealing act and it passed out of the State courts uninfluenced by anything in that act.* True the intermediate court attempted to make use of the repealing act for the benefit of the plaintiff in error saying its franchises had been appropriated by the State under the repealing act, but no court rested upon or used in any wise the repealing act in derogation of the company's charter.

It is we understand the ruling of this court that where the State court gives no effect to the subsequent enactment (which is claimed to impair the obligation of a contract) the jurisdiction of this court does not attach, and in determining whether effect has been given to the latter statute the court is not limited to a mere consideration of the language of the opinion of the

State court. (*Louisiana Ry. & Navigation Co.* v. *New Orleans*, 235 U. S. 164.)

We have therefore attempted to show that the Court of Appeals acted entirely outside the repealing act, without any recognition of its validity or operation, and that the decision of the court would have been the same had no repealing act been passed or thought of.

It does not seem desirable to quote from the numerous decisions of this court showing that ~~section 237 of the Judicial Code~~ does not "reach errors committed by a State court *when passing upon the validity or effect of a contract under the laws in existence when it was made.*" ~~Section 237,~~ The Prohibition as it has been repeatedly stated, is aimed only at the legislative power of states and not at the decisions of their courts.

Cross Lake Country Club v. *Louisiana*, 224 U. S. 632, 638.

New Orleans Waterworks v. *Louisiana Sugar Co.*, 125 U. S. 18, 38, 39.

St. Paul Gas Light Co. v. *St. Paul*, 181 U. S. 142.

Fisher v. *New Orleans*, 218 U. S. 438.

Missouri & Kansas Interurban Ry. Co. v. *Olathe*, 222 U. S. 187, 190.

Central Land Co. v. *Haidley*, 159 U. S. 103, 110.

Ennis Waterworks Co. v. *Ennis*, 233 U. S. 652, 655-657.

Bacon v. *Texas*, 163 U. S. 207.

Turner v. *Wilkes County Commissioners*, 173 U. S. 461, 462, 463.

Railroad Company v. *McClure*, 10 Wallace, 511, 515.

The constitutional prohibition against the impairment of contracts

McCullough v. *Virginia*, 172 U. S. 111, 116, 117.
Lehigh Water Company v. *Easton*, 121 U. S. 338.

The Court of Appeals decided this case on grounds entirely independent of the repealing act. In fact *the State courts had jurisdiction of this case before the repealing act was passed and had already decided adversely to the constitutionality of the charter. The courts therefore and not the Legislature have destroyed the charter of the Long Sault company.*

We have thought the proposition so well established as not to permit citation of authority that the question whether a State law violates the State Constitution does not present a Federal question. (*Hadacheck* v. *Sebastian*, 239 U. S. 394.) And yet plaintiff in error purports to find authority in section 237 of the Judicial Code for a review of this very question.

Section 237 of the Judicial Code (formerly § 709 of the Revised Statutes) reads as follows:

> "A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under any State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of their validity; or where any title, right, privilege, or immunity is claimed under the Constitution, or any treaty

> or statute of, or commission held or authority exercised under, the United States, and the decision is against the title, right, privilege, or immunity especially set up or claimed, by either party, under such Constitution, treaty, statute, commission, or authority, may be re-examined and reversed or affirmed in the Supreme Court upon a writ of error."

The above statute contains three groups of State court decisions. The United States Supreme Court will review:

1. Where the validity of a treaty or statute of, or an authority exercised under the United States, is drawn in question and the decision of the State Court is against their validity;

2. Where the validity of a statute of or an authority exercised under any State, is drawn in question on the ground of their being repugnant to the Constitution, treaties or laws of the United States, and the decision of the State court is in favor of their validity;

3. Where any title, right, privilege or immunity is claimed under the Constitution, or any treaty or statute of, or commission held, or authority exercised under, the United States, and the decision of the State court is against the title, right, privilege or immunity so set up or claimed under such Constitution, treaty, statute, commission or authority.

Under subdivision B of the first point of the brief of the plaintiff in error (p. 28) it is asserted that the repealing act and the legislative, executive and judicial action of the New York State government has been drawn in question as being repugnant to the Constitution of the United States, and the decision of the State court has been in favor of the validity of the State action.

We have previously shown that the validity of the repealing act was not drawn in question because the repealing act was not noticed or given any force or effect in the determination of the Court of Appeals. In every case which plaintiff in error cites, where this court *has taken* jurisdiction to determine whether a contract exists and has been impaired, there was involved, the facts show, the *enforcement* by the State court of a *subsequent* statute of the State Legislature. We will refer seriatim to the cases cited by the plaintiff in error.

In *Bridge Proprietors* v. *Hoboken Co.*, 1 Wallace, 116, an act of 1860 of the State Legislature of New Jersey granted rights which it was claimed had already been granted to others by a statute of 1790. Suit for injunction was brought by the grantees under the act of 1790 against the beneficiaries under the act of 1860, and the question clearly was whether the act of 1860, the *subsequent statute,* which the State court *enforced,* was valid.

In *Jefferson Branch Bank* v. *Skelly,* 1 Black, 436, although the language used is very broad with respect to the right of this court to review the contracts of States, the court is careful to elucidate that jurisdiction depends always in such cases upon the fact that a person has been "aggrieved by some particular State *legislation.*" A subsequent taxing statute was *enforced* by the State of Ohio in violation of an earlier exemption statute.

In *University* v. *People,* 99 U. S. 309, in order to decide whether a *subsequent* taxing statute of 1872 should operate (and the State court had de-

clared it should be *enforced*), it was necessary to inquire whether an earlier exemption statute of 1855 constituted a valid contract.

In *Wright* v. *Nagle*, 101 U. S. 791, the *subsequent* State action which impaired the grant to maintain a toll bridge was the granting (i. e. enforcement) of a new franchise to different parties for a toll bridge in the same vicinity.

A subsequent *municipal ordinance enforced* against a railroad, in *Atlantic Coast Line Railroad Company* v. *City of Goldsboro*, 232 U. S. 548, was alleged to have impaired the original railroad franchise.

The same may be said of *Louisiana Railway & Navigation Co.* v. *New Orleans*, 235 U. S. 164, where the city authorities gave "vitality and *operation* to the subsequent law" in such a way as to defeat a prior ordinance conferring rights upon the railroad company.

With respect to *McCullough* v. *Virginia*, 172 U. S. 102, this court is well aware that the State court in that case, in order to give *effect* to subsequent taxing legislation, attempted to thwart the jurisdiction of the United States Supreme Court by the ruse of deciding that the original exemption statute was void; and this after the same court, and the United States Supreme Court also, had earlier declared the exemption statute valid. Mr. Justice Brewer's opinion contains this significant language:

> "It must also be borne in mind that THIS IS NOT A CASE IN WHICH, AFTER A STATUTE ASSERTED TO BE THE FOUNDATION OF A CONTRACT, ACTS ARE PASSED DESIGNED AND TEND-

ING TO DESTROY OR IMPAIR THE ALLEGED CONTRACT RIGHTS, AND THE FIRST TIME THE QUESTION IS PRESENTED TO THE HIGHEST COURT OF THE STATE IT TAKES NO NOTICE OF THE SUBSEQUENT ACTS, BUT INQUIRES SIMPLY AS TO THE VALIDITY OF THE ALLEGED CONTRACT. Here it appears that the state courts had repeatedly held the act claimed to create a contract valid, and had passed upon the validity of subsequent acts designed and calculated to destroy and impair the rights given by such contract, sustaining some and annulling others. Some of those judgments had been brought to this court, and by it the validity of the original act had been uniformly and repeatedly sustained, and the invalidity of subsequent and conflicting acts adjudged, and now at the end of many years of litigation, with these subsequent statutes still standing on the statute books unrepealed by any legislative action, the state court, with only a casual reference to those later statutes, goes back to the original act, and, reversing its prior rulings, adjudges it void, thus in effect putting at naught the repeated decisions of this court as well as its own. Under such circumstances it seems to us that it would be a clear evasion of the duty cast upon us by the Constitution of the United States to treat all this past litigation and prior decisions as mere nullities and to consider the question as a matter *de novo*. It would be shutting our eyes to palpable facts to say that the Court of Appeals of Virginia has not by this decision given effect to these subsequent statutes."

It is, therefore, quite apparent that the cases cited by plaintiff in error have no application where the subsequent legislative act, as in the

case now before the court, has been left untouched and unenforced for the reason that it was entirely unnecessary to turn to it or give it any effect in arriving at the judgment which the Court of Appeals rendered.

The plaintiff in error, continuing its argument, seems to think that it had a right under the Federal Constitution to the protection of *public confidence* in the validity of its franchise, so that it might the better seek capital and obtain the consent of Congress, and, therefore, the acts of the Attorney-General, the Governor and the Legislature in concerning themselves with, in discussing and in construing the Long Sault statute impaired the obligation of the charter. This is certainly a radical view that the State officers or departments of State government must forever remain silent as to the constitutionality of former legislation lest perchance they destroy a stock and bond market; and more preposterous still is the assertion that the determination of the highest court of New York State was influenced by these acts of the other departments of State government, and that that court was practically in league to " complete the impairment " by holding the charter invalid. (P. 37.)

In the case of *Carondelet Canal Co.* v. *Louisiana*, 233 U. S. 362, in the brief of plaintiff in error, it was the appointment of a Board of Control by an act of the Louisiana Legislature, which board was charged with the duty of *taking over* property which the canal company claimed to own, that constituted the " authority exercised " under State law resulting in the accrual of jurisdiction in this Court. In our case the State officers exer-

cised no authority whatsoever. They did not attempt to interfere nor had they power to interfere under State law with the rights or property claimed by the Long Sault company. The State officers simply raised the question whether those rights were lawfully possessed. Raising a question cannot be exercising an authority. Consequently no " authority exercised " by State officers was involved in or upheld by the Court of Appeals' decision.

Under subdivision C of point one (p.41), plaintiff in error claims that this case would also fall within the third group of cases referred to in section 237 of the Judicial Code, namely, those cases in which a title, right or immunity under the Federal Constitution is claimed in the State court and the decision of the State court has been against such right or title.

No right, title, privilege or immunity under the Federal Constitution could, we think, be involved in the State court where the question there presented was but the testing of the charter with the requirements of the Constitution of New York State. The plaintiff in error had no rights whatever except as it received them under that charter. It is only by assuming the validity of the charter and the actual existence of the property rights expressed therein and by then bringing in the State court decision as in derogation thereof that the plaintiff in error can make any claim to a Federal constitutional right or immunity having been violated. Now the State court decision could not violate property rights protected by the Federal Constitution if no such rights existed, and surely a decision by the State court that the

grant to the plaintiff in error was beyond the constitutional authority of the Legislature, could not be a taking without due process of law of rights which never were lawfully granted.

In all the cases cited by plaintiff in error under subdivision C of point one, the rights, privileges or immunities were *created* (not merely protected) by the Federal Constitution or by Federal statute. *In our case the rights were created by the State, and the Federal constitutional protection applied to them only if the State statute was effectual in creating them.*

We analyze the cases presented by the brief of the plaintiff in error:

In *St. Louis & Iron Mountain Railway* v. *Taylor,* 210 U. S. 281, the State court was construing a Federal statute. Such a situation beyond doubt always raises a Federal question.

In *Atchison, Topeka & Santa Fe Ry.* v. *Sowers,* 213 U. S. 55, the issue was whether a State was required to give force and effect to the laws of a territory, and that of course is a Federal question arising under the full faith and credit clause, and a refusal to apply the territorial statute was the denial of a privilege or right under the Federal Constitution.

In *Chicago, Burlington & Quincy Railroad Co.* v. *Chicago,* 166 U. S. 226, there arose the question of taking property without just compensation. This also is a right or immunity granted by the Fourteenth Amendment, but is inoperative until property rights are found.

In *Williams* v. *Bruffy,* 96 U. S. 176, a subsequent statute impaired the obligation of a contract.

In *American Sugar Refining Co.* v. *Louisiana,* 179 U. S. 89, the question was whether a State statute denied the equal protection of the laws, and so also in *Yick Wo* v. *Hopkins,* 118 U. S. 356.

The question of taking property without due process of law was involved in the decision of *Scott* v. *McNeil,* 154 U. S. 34.

All the above cases presuppose the existence of property rights. The existence of property rights is a local State question (*St. Anthony Falls Water Power Co.* v. *Commissioners,* 168 U. S. 349; *State* v. *Sanford,* 19 How. 393; *Eldridge* v. *Trezerant,* 160 U. S. 452, 466; *Sauer* v. *New York,* 206 U. S. 536). As we have before said, the rights of the plaintiff in error, if any there were, were created by the State statute, and the Federal constitutional protection applied to them only if the State statute was effectual in creating them.

It follows that the question of Federal rights or immunities was not passed upon by the State court and was not a question which had to be decided in order to induce the judgment arrived at by the Court of Appeals. The State court gave judgment without being obliged to consider the Federal question. In short there was no Federal right which the judgment could or did deny. This Court accordingly will not take jurisdiction.

Crowell v. *Randell,* 10 Peters, 368, 392.
Sayward v. *Denny,* 158 U. S. 180, 184.
Giles v. *Teasley,* 193 U. S. 146, 160.
Chicago, Burlington & Quincy Railroad Co. v. *Drainage Commissioners,* 200 U. S. 561, 580.
Western Union Telegraph Co. v. *Wilson,* 213 U. S. 52.

First National Bank v. *Estherville*, 215 U. S. 341.
Appleby v. *Buffalo*, 221 U. S. 524, 529.

In *Crowell* v. *Randell* above, Mr. Justice Story observed that it must appear,

> " from the facts stated by just and necessary inference, that the question was raised, and that the court below must in order to have arrived at the judgment pronounced by it, have come to the very decision of that question as indispensable to that judgment."

And as Chief Justice Fuller, speaking for the court in *Sayward* v. *Denny*, above cited, has stated:

> " It must appear from the record by clear and necessary intendment, that the federal question was directly involved so that the State court could not have given judgment without deciding it."

Plaintiff in error further contends under subdivision E of point one (p. 47), that by the amendment of December 23, 1914, to section 237 of the Judicial Code a review of the questions contained in this record may be had even if the plaintiff in error has no standing in presenting them to this Court. The amendment of 1914 added the provision that the decision of the State court might be reviewed when it has been in favor of the validity of the United States statute or authority or against the validity of the State statute.

In reply we need but state that no revision by this Court will take place if the decision was in favor of Federal rights except on application of

the party aggrieved by the decision, for no revision would be necessary to protect the national government in the exercise of its rightful powers (*Missouri* v. *Andriano,* 138 U. S. 496, 500). Applying the rule to our case it would be necessary that the State of New York apply for a review in the event the decision had been against it. Only those persons belonging to the class for whose benefit a particular statute was enacted may take advantage of its provisions.

Red River Valley Bank v. *Craig,* 181 U. S. 548, 558.
Hatch v. *Reardon,* 204 U. S. 152, 160.
Rosenthal v. *New York,* 226 U. S. 260, 271.
Missouri, Kansas & Texas R. R. v. *Cade,* 233 U. S. 642, 648.

For this Court to decline jurisdiction will not work a grave hardship upon the plaintiff in error, for the repealing acts of 1913, chapters 452 and 453, in addition to directing the State Comptroller to return to the company every dollar it had paid to the State, offered the plaintiff in error the Board of Claims as a tribunal in which to obtain redress for its losses (outside of its alleged franchise rights). The act contains this paragraph:

> "Section 1. Jurisdiction is hereby conferred upon the board of claims to hear, audit and determine the alleged claims, if any, which may be presented by the Long Sault Development Company against the state of New York by reason of the repeal by the legislature of chapter three hundred and fifty-five of the laws of nineteen hundred and

> seven, and the state hereby consents in all such claims to have its liability determined, provided that such alleged claims, if any, shall be filed with the board of claims within six months after this act takes effect. No award shall be made on any such claims against the state except *upon such legal evidence as would establish a liability against an individual* or corporation in a court of law or equity."

Whatever moneys the company had been induced to expend upon the faith of the illegal grant and were lost to it, would be such as could have been recovered *against an individual* in a court of equity. Plaintiff in error admits that it could have recovered such losses (p. 126 plaintiff in error's brief):

> "These facts gave a foundation for *an equitable moral claim;* and the direction in Chapter 452, to repay to the Company all *amounts paid* to the State Treasurer with interest, is a clear legislative recognition of the merit of a claim which was capable of liquidation, while the *other claims of the same character* had of necessity to be referred by Chapter 453 to the Court of Claims because they were unliquidated.
>
> If we construe Chapter 452 as intended to effect an absolute repeal of the special franchises because they were unconstitutional and Chapter 453 as providing a method for ascertaining *unliquidated, equitable claims,* we shall give to the acts a meaning consistent with a purpose of the legislature."

Yet the plaintiff in error apparently did not desire to take advantage of the Court of Claims as a source from which to recover its equitable

losses, and now proceeds to attack the State's offer to pay damages as unconstitutional on the theory that it is a gift of the State's moneys. We are confident the Act of 1913, chapter 453, is not unconstitutional in this regard (see Point VII of this brief).

The writ of error should be dismissed for want of jurisdiction.

POINT II

THE LEGISLATURE CANNOT ALIENATE ITS TOTAL SOVEREIGN CONTROL OVER NAVIGATION UPON PUBLIC WATERS TO A PRIVATE WATER POWER CORPORATION WHICH UNDER THE TERMS OF THE GRANT IS NOT OBLIGED TO PERFORM ANY PUBLIC SERVICE WHATEVER. THIS PRINCIPLE HAS BEEN CLEARLY PRONOUNCED BY THIS COURT IN ILLINOIS CENTRAL RAILROAD CO. v. ILLINOIS, 146 U. S. 387.

This point though not presented in the opinion of the Attorney-General to the Senate, was raised by him in the courts.

It has been long past controversy that the Legislature, may not surrender its sovereign duties over the public health and morals. Shortly after the decision in the Slaughter House Cases, this Court held in *Butchers' Union Co.* v. *Crescent City Co.*, 111 U. S. 746, 753, that the special franchise granted to the Slaughter House Company to monopolize the killing of animals in New Orleans, was not such a contract as could limit the future exercise of legislative power on that subject to the prejudice of the general welfare:

> "No legislature can bargain away the public health or the public morals. The people themselves cannot do it, much less their servants. The supervision of both these subjects of governmental power is continuing

> in its nature, and they are to be dealt with as the special exigencies of the moment may require. Government is organized with a view to their preservation, and cannot divest itself of the power to provide for them. For this purpose the legislative discretion is allowed, and the discretion cannot be parted with any more than the power itself."

Similar decisions have issued from this court at various times in:

Stone v. *Mississippi,* 101 U. S. 814.
New Orleans Gas Co. v. *Louisiana Lighting Co.,* 115 U. S. 667.
Newton v. *Commissioners,* 100 U. S. 548.
Charles River Bridge Co. v. *Warren Bridge,* 11 Peters, 420.

In respect of the governmental control over navigable waters, it has likewise become fundamental law that the Legislature cannot abdicate its sovereign trust thereover, and that every grant of a right to erect structures in navigable waters, and every grant of lands beneath them, excepting it may be a grant in the direct aid of commerce, is subject to the implied reservation that the State may destroy it with impunity in the improvement of navigation.

In *Smith* v. *Rochester,* 92 N. Y. 463, 477, the court says:

> "Among other rights which pertain to sovereignty is that of using, regulating and controlling for special purposes the waters of all navigable lakes or streams, whether fresh or salt, and without regard to the ownership

of the soil beneath the water. This right is known as the *jus publici* and is deemed to be inalienable.

While a sovereign may convey its proprietary rights, it cannot alienate its control over navigable waters without abdicating its sovereignty" (p. 483).

In *Matter of City of New York*, 168 N. Y. 134, 145:

"The right of control over navigable waters of the state is a legislative power and cannot be destroyed by any authority whatsoever."

In *Coxe* v. *The State*, 144 N. Y. 396, 405:

"That the dominion and ownership of such lands is in the sovereign for the benefit of the public has long been settled. Such dominion and ownership of property generally implies the power of absolute disposition, but with respect to the land under navigable or tidal waters an important limitation has been engrafted upon this power from the nature of the title. The title of the state to the seacoast and the shores of tidal rivers is different from the fee simple which an individual holds to an estate in lands. It is not a proprietary, but a sovereign right, and it has been frequently said that a trust is engrafted upon this title for the benefit of the public of which the state is powerless to divest itself." (Citing cases.)

In *Illinois Central Railroad Co.* v. *Illinois*, 146 U. S. 387, 452:

"That the state holds the title to the lands under the navigable waters of Lake Michigan, within its limits, in the same manner that the state holds title to soils under tide water, by

> the common law, we have already shown, and that title necessarily carries with it control over the waters above them whenever the lands are subjected to use. But it is a title different in character from that which the state holds in lands intended for sale. * * * It is a title held in trust for the people of the state that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction or interference of private parties. * * * The state can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them, so as to leave them entirely under the use and control of private parties, except in the instance of parcels mentioned for the improvement of the navigation and use of the waters, or when parcels can be disposed of without impairment of the public interest in what remains, than it can abdicate its police powers in the administration of government and the preservation of the peace."

The principle has had such recent application in *Fulton Light Heat and Power Co.* v. *The State,* 200 N. Y. 400, 417, in *Lewis Blue Point Oyster Co.* v. *Briggs,* 198 N. Y. 287, 292; 229 U. S. 82, and in *United States* v. *The Chandler-Dunbar Water Power Co.,* 229 U. S. 53, that quotations from further authorities will but overburden our brief.

At page 418 of the *Fulton Light, Heat and Power Company* case the court said:

> "The right of the State to make improvements in the river for the benefit of the public, in facilitating navigation and transportation thereon must be fully conceded. It may do so without regard to the private owner-

> ship of the bed of the river. The proprietary interest of the riparian owner is subordinate to the public easement of passage and the State may be regarded as the trustee of a special public servitude * * *. In the exercise of its authority, in that respect, the legislature may direct the performance of acts by state officers which tend to promote the public right of passage and transportation, without subjecting the state to liability."

At page 87 of the *Lewis Blue Point Oyster* case, Mr. Justice Lurton writes:

> "If the public right of navigation is the dominant right and if, as must be the case, the title of the owner of the bed of navigable waters holds subject absolutely to the public right of navigation, this dominant right must include the right to use the bed of the river for every purpose which is in aid of navigation. This right to control, improve and regulate the navigation of such waters is one of the greatest of the powers delegated to the United States by the power to regulate commerce."

And at page 62 of the *Chandler-Dunbar Water Power* case, the same justice again writes:

> "This title of the owner of fast land upon the shore of a navigable river to the bed of the river, is at best a qualified one. It is a title which inheres in the ownership of the shore and, unless reserved or excluded by implication, passes with it as a shadow follows a substance, although capable of distinct ownership. It is subordinate to the public right of navigation, and however helpful in protecting the owner against the acts of third parties, is of no avail against the exercise of

the great and absolute power of Congress over the improvement of navigable rivers. That power of use and control comes from the power to regulate commerce between the States and with foreign nations. It includes navigation and subjects every navigable river to the control of Congress. All means having some positive relation to the end in view, which are not forbidden by some other provision of the Constitution, are admissible. If, in the judgment of Congress, the use of the bottom of the river is proper for the purpose of placing therein structures in aid of navigation, it is not thereby taking private property for a public use, for the owner's title was in its very nature subject to that use in the interest of public navigation."

The following authorities may be consulted for illustrations of the same principle:

Vanderbilt v. *Adams,* 7 Cow. 349, 350.
Slingerland v. *International Contract Co.,* 43 App. Div. 215; affd., 169 N.Y. 60, 70.
Canal Appraisers v. *People,* 17 Wend. 571.
Matter of Commissioners of State Reservation, 37 Hun 537.
City of Buffalo v. *D. L. & W. R. R. Co.,* 136 App. Div. 274; affd. 204 N. Y. 562.
Lehigh Valley R. R. Co. v. *State,* 146 App. Div. 151, 159; approved 204 N. Y. 473, 474.
Sage v. *The Mayor,* 154 N. Y. 61, 79.
Matter of Fishway, 131 App. Div. 403.
People v. *New York & Staten Island Ferry Co.,* 68 N. Y. 71, 77.

Langdon v. *The Mayor*, 93 N. Y. 129.
West Virginia Pulp and Paper Co. v *Peck*, 82 Misc. Rep. 72, (Aug. 1913).
Union Bridge Co. v. *United States*, 204 U. S. 364.
Greenlief Lumber Co. v. *Garrison*, 237 U. S. 251.
Philadelphia Co. v. *Stimson*, 223 U. S. 605.

The foregoing expressions are not presented here to deny the right of the State to let out to a corporation the improvement of a waterway, reserving to the company in compensation the privilege of taking tolls, for that method was early employed when government funds were small, and has been continued since in instances without number. But these corporations were in fact subordinate governmental agencies *obliged to improve navigation* over whose activities the State retained control both as to the method of navigation improvement and the regulation of tolls.

Sands v. *Manistee River Improvement Co.*, 123 U. S. 288.
Monongahela Navigation Co. v. *U. S.*, 148 U. S. 312.
People v. *Canal Appraisers*, 33 N. Y. 461.

To the Long Sault Company was handed over absolute control of the river St Lawrence *with not a single duty upon the company with respect to navigation improvement* except to *preserve navigation as good as the company found it*

(which of course is the very opposite of improvement), with no reservation of a right in the State to regulate the number, size, form or location of the water power dams and without reservation of the State's sovereign right and duty to guard in the future the public interest of navigation.

The title of the Long Sault act apprises us that one of the objects of the incorporation is " to improve the navigation of the St. Lawrence river." In the act as regards navigation we find this meagre agreement with the State of New York, and nothing more: " upon condition that the rights hereby granted shall never be so used as to impair or obstruct the navigation of the St. Lawrence river but on the contrary that such navigation shall be preserved in as good condition as, if not better than, the same is at present, regard being always had to the amount of the natural flow of water as affecting its navigability from time to time."

This stipulation is of no value whatever to the State. It does not bind the company to do one act toward the improvement of navigation. They shall not impair the navigation, yet they need not better it, meeting sufficiently their obligations if navigation is kept as good as it is at present, which all admit is not very good. In other words, the State gets nothing. With all their great structures in the river and the expectant hopes of the people that navigation will be enhanced, the company may leave navigation just as bad as now, and even worse than it is at present if regard must be had " to the amount of the natural flow of water in the river " after the construction of the dams, since the company may need

at times for water power purposes all the water impounded, sparing none for navigation. To express it differently, if the amount of the natural flow of the water in the river would, assuming the dams were not there, prevent any navigation, the company may take advantage of that fact and, although it may have sufficient waters stored by its dams to keep navigation open, no duty rests upon it to use the waters in that way, but it may instead employ them solely for its power generation. The State of New York would be powerless under the contract. The only authority which may by the act *cause the construction and enforce the use of locks* is the United States government:

> "and that said corporation shall also erect and construct a lock or locks as may be required by the United States of America" (Record, p. 24).

The Legislature, acting in the name of the State, has no right to thus divest itself of powers over commerce in reliance upon future action of the higher authority of the Federal government, nor to surrender, as it has, to a private company exclusive control over the navigation to the injury of the public. We refer to the authorities previously cited.

Chief Judge Bartlett of the Court of Appeals well expressed the doctrine where he says (Record, p. 70):

> "It (the Long Sault charter) virtually turns over to the corporation entire control of navigation at the Long Sault Rapids (provided, of course, that the consent of Congress can be obtained). All that the corporation

must do is to construct the contemplated works, pay the stipulated sums and *keep the navigation as good as it is now. No matter how much the interests of the public may demand the improvement thereof in the future, the state will be powerless to act either directly or by constraint upon the corporation.* It is precisely as though the legislature should confer upon a corporation exclusive authority to construct works on the Hudson river to improve the navigation between Albany and Troy upon condition that such navigation shall be preserved in as good condition as the same is at present, *and thereby preclude the state from ever hereafter improving the navigation itself.* In my opinion the legislature cannot make such a contract in behalf of the state." * * *

"The point that I desire to emphasize is that *the legislature cannot authorize the conveyance of a navigable portion of the St. Lawrence to a private company to maintain and control navigation thereon, thereby parting for all time with its own power to improve such navigation.* The privilege of the state to control the St. Lawrence as a navigable river (subject to the direction of Congress) cannot be assigned to others in the manner attempted by this legislation. As long as the waters are maintained as navigable they remain public waters of the state; and as long as they remain public waters of the state the state is bound to retain control over them in the public interest."

And as was said by this court in *Illinois Central Railroad Company* v. *Illinois,* 146 U. S. 387, 454:

"The State holds the title to the lands under the navigable waters in trust for the people of the State that they may enjoy the

navigation of the waters, carry on commerce over them and have liberty of fishing therein, freed from the obstruction or interference of private parties. * * * The control of the State for the purposes of the trust can never be lost except as to such parcels as are used in promoting the interest of the public thereon or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining. * * *

The State can no more abdicate its trust over property in which the whole people are interested, *like navigable waters* and soils under them, so as to leave them entirely under the use and control of private parties except in the instance of parcels mentioned for the improvement of the navigation and use of the waters, or when parcels can be disposed of without impairment of the public interest in what remains, than it can abdicate its police powers in the administration of government and the preservation of the peace."

"The harbor of Chicago is of immense value to the people of the State of Illinois in the facilities it affords to its vast and constantly increasing commerce; and *the idea that its legislature can deprive the State of control over its bed and waters and place the same in the hands of a private corporation created for a different purpose, one limited to transportation of passengers and freight between distant points and the city, is a proposition that cannot be defended.*"

By the Long Sault charter all control over navigation on one of the greatest rivers of the State, and an international boundary stream, was simply abdicated in favor of a private corporation, the aim of whose existence was not navigation betterment but financial gain from water power development.

"Navigation," we submit, was tucked in the Long Sault act by its accelerators as a subterfuge to secure, and make secure, the grant of water power. The act was an attempt to create a franchise free from attack by the State itself in the exercise of its sovereign duty to improve this waterway as the calls of commerce might make necessary. And New York State it is very apparent will need the future control of these waters in the interest of navigation, if not for water power development, for the reason, as stated in the *Chandler-Dunbar Water Power case,* 229 U. S. 53, at page 67, concerning the St. Mary's river, connecting Lake Superior and Lake Huron, a navigation point no more strategic than the St. Lawrence river, the outlet of all the Great Lakes to the sea:

> "The falls and rapids are at the exit of the river from the lake. Millions of public money have already been expended in the construction of canals and locks, by this government upon the American side, and by the Canadian government upon its own side of the rapids, as a means by which water craft may pass around the falls and rapids in the river. The commerce using these facilities has increased by leaps and bounds. The first canal had hardly been finished before it became inadequate. A second upon the American side was constructed parallel with the first. The two together are insufficient, though the canal upon the Canadian side accommodates much of the commerce. The main purpose of the act of 1909 was to clear the way for generally widening and enlarging facilities for the ever growing commerce of the Great Lakes."

Commerce through the Cornwall canal which carries traffic around the Long Sault rapids

totaled in 1867 in freight 753,114 tons; in 1886 in freight 530,568 tons, and in 1906 in freight 1,636,-117 tons. The total of freight tons in 1914 was 4,391,493. Which means, that present day commerce through the St. Lawrence river at this point has increased *250 per cent.* in *eight* years! (Canadian Parliament Sessional Papers, 1907–8, No. 10, p. 97; Sessional Papers, 1915, No. 14, p. 45).

The State may soon need all the waters of the Long Sault for navigation. The promise to keep navigation as good as now, is in its very terms an impairment to future navigation. When the time for future improvement arrives, the company may say " we do not care to improve; we have the water power, the grant to control navigation and the title to lands under water; if you wish to improve, you will have to *pay for them.*" What it will cost the State to appropriate the property, the company will compute as follows: It will have on hand 600,000 horse power of developed water power worth (at low figures) $300 per horse power, which means $180,000,000. It has furthermore invested $50,000,000 in the dams, power houses and other property of the company (report on bill S. 1058, 61st Congress, 3d session), but one-half of which amount will be included in the above figure of $180,000,000. Thus the total cost to the State for the opportunity hereafter to improve navigation on the St. Lawrence at the Long Sault rapids may easily amount to the sum of $200,000,000. (For further data with respect to the magnitude of this water power project see Point III of this brief.)

In passing, it may be argued that the act, not having had the approval of the Canadian govern-

ment, violates the Webster–Ashburton Treaty of 1842, providing that:

> "Channels in the river St. Lawrence on both sides of the Long Sault Islands and of Barnhart Island * * * shall be equally free and open to the ships, vessels, and boats of both parties."

However that may be, clearly the Long Sault bill endeavors to abdicate to this private corporation all the sovereign trust in the State of New York over miles of this great navigable river to be covered by the structures of the company and the waters held back by the dams. The very statement of its enormity puts beyond countenance the possibility of the Legislature having any such power. As well might they give up, as Judge Bartlett said, New York harbor or the Hudson river at Albany to private business concerns. And more pernicious still is the provision allowing without restriction the transfer of the franchises, which may result ~~it may be~~ in the full control over navigation of the St. Lawrence at this point becoming vested in a private individual.

A PUBLIC PURPOSE IN A GRANT OF THIS CHARACTER MUST BE MORE THAN INCIDENTAL.

There are authorities to the effect that when the Legislature has announced a public purpose in a bill, it cannot be gainsaid by showing that

the act will not accomplish the purpose expressly stated, and accordingly, as regards our case, it can be of no moment that old navigators in the vicinity of the Long Sault will say that navigation up stream to the foot of the dams will be just as impracticable as at present (Memorandum in opposition to H. R. 14531, 61st Congress, 2d session, before Rivers and Harbors Committee), and that ice jams in the river will, by reason of the obstructions, become a serious menace to navigation and to surrounding communities. The above principle is not to say, however, that the courts may not, when the Legislature avows a public purpose, look beyond that bare statement and seek out the true intent of the bill. Whether the purposes therein stated are in fact public, is a judicial question not bound down by any declaration in the bill.

Matter of Niagara Falls & Whirlpool R. R. Co., 108 N. Y. 375.
Matter of Application of Eureka Basin Warehouse Company, 96 N. Y. 42.
Matter of Jacobs, 98 N. Y. 111.
Waterloo Woolen Co. v. *Shanahan*, 128 N. Y. 345, 357.

Safeguarding the public trust over navigation is quite as essential as safeguarding the power of eminent domain over lands throughout the State, if not more so, for the reason that navigation is restricted to small, unchanging portions of the earth's surface and cannot like railroad transportation, be built up here or there at will.

A railroad corporation in *Matter of Niagara Falls & Whirlpool R. Co., supra,* sought to con-

demn lands at the foot of the cliffs along the whirlpool rapids in the Niagara river. The proposed road did not connect with any railroad at either end, or with any public highway, and the only commerce available was the carrying of sightseeing passengers for the profit of the corporation. At page 384 the court says:

> "the sole object of its construction is to enable the corporation, for a compensation to be received, to provide for the portion of the the public who may visit Niagara Falls, better opportunities for seeing the natural attractions of the locality. We feel constrained to say that in our judgment this is not a public purpose which justifies the exercise of the high prerogative of sovereignty invoked in aid of this enterprise."

In *Matter of the Application of the Eureka Basin Warehouse and Manufacturing Company, above,* a corporation was organized with the right by special act,

> "to enter upon Bushwick creek and the marsh and other lands contiguous thereto in the city of Brooklyn, on the land described in their certificate of incorporation, * * * and thereupon to excavate, dredge, build, construct, establish, and maintain a dock or docks, basin or basins, piers, wharves, warehouses, and other buildings necessary and proper for the purpose of docking, loading and unloading vessels, and of storing goods and merchandise, and for carrying on the general business of a dock and warehouse company, * * * and should have the right to demand and receive reasonable rent, storage, dockage, and wharfage for the use of its premises."

Thereafter by subsequent *special act* of the Legislature, the power of eminent domain was conferred upon the company and it was provided that:

> " This act is hereby declared to be a public act, and the basin of said company shall at all times be open to public use for all vessels that may apply therefor, and said company shall commence operations within one year from the passage of this act and expend thereon not less than ten per centum of the capital."

Nevertheless, the Court of Appeals failed to find that the structures of the company were for public use, no right being open to the public except the right to enter the basin, unconnected with any right to use the wharves (*Matter of Eureka Basin Warehouse and Manufacturing Co.*, 96 N. Y. 42, 48):

> " We cannot regard such a project as a public purpose or use which justifies the delegation to this company of the right of eminent domain. *The enterprise is, in substance, a private one, and the pretense that it is for a public purpose is merely colorable and illusory.* The taking of private property for private purposes cannot be authorized even by legislative act, and the fact that the use to which the property is intended to be put, or the structure intended to be built thereon, will tend incidentally to benefit the public by affording additional accommodations for business, commerce or manufactures, is not sufficient to bring the case within the operation of the right of eminent domain, so long as *the structures are to remain under private ownership and control, and no right to their use or to direct their management* is conferred upon the public."

The same may be said of the Long Sault franchise. That a dam and locks may incidentally benefit the navigation of the St. Lawrence at this point is not sufficient cause for delegating the whole power over navigation to the company, *when the structures are to remain under private ownership and control and no right to direct their management is reserved to public officers.*

In *Fallsburg Power and Manufacturing Co.* v. *Alexander,* 101 Va. 98; 61 L. R. A. 129, a company was organized by special act, with a franchise to use water power on the James river for the generating of electrical energy, which it might distribute to any place for its own use or for the use of other individuals or corporations. For the purpose of utilizing or delivering the power, the company was given all the powers of an " internal improvement company." In a proceeding to condemn water rights along the James river the company was met and defeated by the following strong language of the court:

> " The judicial practice in such cases is to approve the undertaking if it is capable of furthering a public use, and to disregard the private benefit as a mere incident. This practice is correct where the public interest clearly dominates the private benefit; as, for example, the public interest in railroad transportation dominates the private benefit from tolls. Even where the disproportion between public and private benefit is much less marked, the courts are justified in sustaining a legislative act by singling out the public use. Randolph Em. Dom. § 54. But this learned author says in § 55: ' In placing works of partly private use, it is essential

that the private use be incidental and not exclusive.'

"To justify the condemnation of lands for a private corporation, not only must the purpose be one in which the public has an interest, but *the state must have a voice in the manner in which the public may avail itself of that use.*

"The general public must have a definite and fixed use of the property to be condemned; a use independent of the will of the private person or private corporation in whom the title of property when condemned will be vested; *a public use, which cannot be defeated by such private owner, but which public use continues to be guarded and controlled by the general public through laws passed by the legislature.*"

Judge Cooley in his work on Constitutional Limitations, page 654, sixth edition, says:

"The public use implies a possession, occupation, and enjoyment of the land by the public at large or by public agencies; and a due protection to the rights of private property will preclude the government from seizing it in the hands of the owner, and turning it over to another on vague grounds of public benefit to spring from the more profitable use to which the latter may devote it."

See also *Berrien Springs Water Power Co.* v. *Berrien,* 133 Mich. 48; 94 N. W. 379.

If we can spell out any care for navigation in the Long Sault act, it was but an incident to the development of power by the company. The grant to build dams and use the waters was followed not by a public purpose to improve navigation *but by a mere condition upon the use of the waters,* namely, "upon condition that naviga-

tion shall not be impaired." The public use, we reiterate, must be more than incidental.

> " The point upon which the present case turns, therefore, is the nature of the use for which the land in question is sought to be taken. It is to be vested in trustees, with power to divide into lots and sell these lots to individual owners. It is difficult to see what interest the public will have in the lands or in their use. No right on the part of the public to buy lots or bury their dead there is secured.
>
> " It is argued that the property is to be used as a place of burial and that the burial of the dead is a public benefit, and therefore, the use is public. But the answer to this argument is, that the right of burial in these grounds is not vested in the public or in the public authorities, or subject to their control, but only in the individual lot-owners."

Matter of Deansville Cemetery Association, 66 N. Y. 569, 573.

"A possible limited right of a part of the property to be acquired is not sufficient if the remainder of the property remains under the absolute control of the condemning corporation or its grantee, freed from any right to the public to make use of the same except by its favor or consent."

Queens Terminal Co. v. *Schmuck,* 147 App. Div. 502.

" We do not find in the act any express provision giving to municipalities or individuals authority to demand the delivery of power to be transmitted and utilized by the corporation formed under the act, or to obtain from it the right to take and use the same at a price in common with all others

similarly situated. The public use must be more than an incidental one."

Economic Power and Construction Co. v. *City of Buffalo*, 195 N. Y. 286, 295.

As to what is or what is not a public use of property, this court follows the decisions of the courts of the particular State (*Clark* v. *Nash*, 198 U. S. 361, 368, 369; *Strickley* v. *Highland Boy Mining Co.*, 200 U. S. 527, 531; *Louisville, etc., R. R. Co.* v. *Stock Yards Co.*, 212 U. S. 132, 151; *Union Lime Co.* v. *Chicago & N. W. Ry.*, 233 U. S. 211, 218).

In conclusion we assert that it is beyond the power of the State to appropriate private *or public* property " for the sole purpose of creating a (private) water power " (*Kaukauna Water Power Company* v. *Green Bay and Mississippi Canal Company*, 142 U. S. 254). We will admit that a State may construct a dam to improve navigation and may sell the surplus waters as a means for meeting the cost of the construction, as was done in the case of *Kaukauna Water Power Company* v. *Green Bay and Mississippi Canal Company, supra*, by the State of Wisconsin and the United States government; and we may further admit that a State might, as compensation to a private corporation for the erection of a dam in behalf of the State to improve navigation, grant to the corporation the use of the surplus waters, as was also done in the *Kaukauna Water Company* case; but we cannot admit that the State may surrender to a company which is *not obliged to improve* navigation, whose primary and ultimate purpose is the construction of dams for water power

(which power also it is under no obligation to furnish the public at large. See final paragraphs in Point III), its entire sovereign control over navigation no matter what the return in money is to the State.

The insertion of a navigation purpose in the Long Sault act was a colorable device, a mask, and a disguise to protect the vast water power grant. A delegation by the Legislature of its sovereign power over navigation, to a private corporation organized to develop water power, in whose hands the exercise of the navigation power is non-enforceable and non-retractable, is an abdication unwarranted and impossible in law.

In the second point of plaintiff in error's brief (p. 50) it is asserted that the New York Legislature was fully performing its sovereign duty to protect and improve navigation at the Long Sault rapids "by referring the whole subject to the Federal government." Our diligence has not been able to discover any provision of the Federal or New York State Constitution which confers upon the Legislature authority to thus divest itself of a sovereign governmental duty (over navigation) which it has from time immemorial exercised, and which this court has so many times held can be relinquished or taken away only by the actual assumption of the entire field by Congress under its superior power. Under this doctrine suggested by counsel for the Long Sault Co., the Legislature could by one act free itself from all control over navigation upon every river, stream and canal in the State.

In subdivision D in point two (p. 63) plaintiff in error proceeds further and advances the theory

that Congress had by the River and Harbor Act of March 3, 1899 (30 Stat. L. 1121) and the Dam Act of June 21, 1906 (34 Stat. L. 386) effectively assumed *all* control of navigation upon the St. Lawrence river previous to the granting of the Long Sault charter.

The very language of those statutes indicates there was no intent upon the part of Congress to supersede entirely the authority of the States, and the decisions have continually so held.

> *Escanaba Co.* v. *Chicago,* 107 U. S. 678.
> *Cummings* v. *Chicago,* 188 U. S. 410.
> *Lake Shore & Michigan Southern Railway* v. *Ohio,* 165 U. S. 365.
> *Montgomery* v. *Portland,* 190 U. S. 89.
> *Gring* v. *Ives,* 222 U. S. 365.
> *Minnesota Rate Cases,* 230 U. S. 352, 404.

There was therefore something of governmental power over navigation left in the State Legislature, and this power was not as they now say purely "theoretical," otherwise the plaintiff in error would not have attempted to obtain and have succeeded in obtaining *from the State* a grant *to improve navigation,* and would not have needed to be astute in inserting a navigation improvement purpose in its charter to justify under the New York Constitution the grant to dam the river perpetually for private water power purposes. When the particular dam and locks have been authorized by Congress such congressional act would, we admit, be an assumption of complete control over navigation at the point in question; but not until such congressional action has taken place does the State lose its power to

improve. And though an improvement conducted by the State itself would have required Federal sanction pursuant to the terms of the Harbor and Dam acts, it does not by any means follow that the necessity of obtaining Federal consent has wiped out the State's *power and opportunity* to improve if Federal consent be first obtained. *By parting* with this power to improve, the State certainly granted something of substance to the Long Sault Company, for the grant, if valid, effectively foreclosed the State for all time from entering upon a project to improve the river at this point.

In Appendices C and D plaintiff in error has collected a list of grants made by the State of New York since the year 1813, authorizing the construction and maintenance of dams, to indicate that the Long Sault grant was no different from hundreds of other grants in New York State.

NOT ONE OF THOSE GRANTS WAS ACTUALLY OR OSTENSIBLY FOR THE PUBLIC PURPOSE OF IMPROVING NAVIGATION, AND WERE, FOR THAT REASON AT ALL TIMES SUBJECT TO THE RESERVED RIGHT OF THE STATE TO COME IN AND IMPROVE WITHOUT COMPENSATION TO THE GRANTEES.

Two recent grants are specifically cited (p. 57). With respect to the *Genesee River Company* case, it will be noted that the dam was to be erected for the public purpose of checking floods, furnishing water to the State canals, etc., which purposes seemingly would be sufficient to sustain the grant as against the State's right to improve navigation.

The grant to the Clinton Mills Power Company by chapter 514 of the Laws of 1911 to construct a dam across the Susquehanna is declared by the statute in abstract terms to be for a public use, yet the public use is not expressed, and may not exist. Mere dam construction for mill power never has been recognized as a public use in New York State (*Hay* v. *Cohoes Co.*, 3 Barb. 47). Consequently the grant may be void. At any rate it is subject to the reserved power to improve as was the original grant of 1813 (chapter 71) which the 1911 statute extended. The original grant of 1813 authorized the construction of a dam across the Susquehanna and required the maintenance of a lock therein for navigation. So also nearly every grant by the State of the right to dam a stream contained the same requirement for the maintenance of a lock or locks (see appendix C of plaintiff in error's brief). These acts were merely dam privileges, with a stipulation or condition upon the privilege. The grants did not purport to be for the purpose of improving navigation, and notwithstanding the fact that they provided for a lock they were not intended to defeat the reserved right of the State to enter upon the river and improve navigation whenever the State so desired (see New York authorities at the beginning of this point, and for a late expression see *West Virginia Pulp & Paper Co.* v. *Peck*, 82 Misc. 72). *Under the Long Sault grant the State could never improve without a condemnation of the company's franchise because the improvement power had been conveyed away* — in perpetuity, and to a grantee who was not obliged to do one act toward the improvement of navigation.

The grant was in excess of the power of the Legislature.

POINT III.

THE LONG SAULT ACT GRANTS AN EXCLUSIVE PRIVILEGE OR FRANCHISE, IN VIOLATION OF ARTICLE III, SECTION 18, OF THE CONSTITUTION OF THE STATE OF NEW YORK.

[This and all subsequent points are presented for the court's consideration, in the event this court should take jurisdiction and disagree with the conclusion of the Court of Appeals as to the illegality of the legislative alienation of the power over navigation. The question whether a valid contract with the State exists would still remain, and must be tested in the light of every objection which the State may advance against the existence of a contract.]

Section 18 of Article III of the State Constitution provides as follows:

> "The Legislature shall not pass a private or local bill in any of the following cases:
> * * *.
>
> "Granting to any private corporation, association or individual any exclusive privilege, immunity or franchise whatever."

This provision of the State Constitution was not inserted until 1874 and took effect January 1, 1875. We have been unable to find any decision of our courts since that time directly involving the question here presented, namely: Does a grant by the Legislature to a private corporation of a

right or privilege to dam a navigable stream and appropriate and utilize the whole power therefrom contravene the above provision.

The Act of 1907 is plainly a private and a local bill. It is a private bill in that it relates only to a particular corporation, organized for private gain, to be controlled by private stockholders. The Court of Appeals, in *Economic Power & Construction Company* v. *The City of Buffalo,* 195 N. Y. 286, held that every act incorporating a company for private gain and generally all acts relating to a single corporation are private acts. This act comes under the above definition and is, therefore, a private act.

It remains to be determined whether the rights and privileges granted are exclusive, within the meaning of the Constitution.

By section 3 of the act in question, the Long Sault Development Company is given the right " to erect, construct, maintain, operate and use such dam or dams, canal or canals, reservoir or reservoirs, gates, sluices, trunks, pipes, bulkheads, piers, flumes, abutments and other works appurtenant thereto, as may be proper or useful for the purpose of the development of water power and of electrical power and energy therefrom, at such point or points upon or adjacent to the south shore of the St. Lawrence river, near Long Sault island or Barnhart's island, and upon the said islands, or either of them, and between said islands or either of them and the shores of the said river and Sheik's island (but not across the international boundary line unless consented to by the Dominion of Canada), as may be selected by said corporation, and also in and upon so much

of the said river and the bed thereof as lies to the south of the international boundary line, at or near Long Sault island or Barnhart's island, either independently or in connection with like works now erected, or to be erected, in so much of said river and the bed thereof as lies to the north or Canadian side of said international boundary line, and upon and adjacent to the northerly shore of said river; and to erect, construct, maintain, operate and use a power-house or power-houses, and conductors, cables, wires, insulators and other appliances in connection with the said works for the development of electrical power and energy; and also to take and use the waters of said river at and above the points of location of said works heretofore authorized."

Stronger or more comprehensive or more definite language could not be used by the Legislature in conferring upon the company the right, power and privilege of controlling, for the purpose of electrical power and energy, the waters of the St. Lawrence river at this point.

This is the greatest development of water power in the world ever exploited under one charter. Over 600,000 horse power is proposed to be developed from the waters under American control, and over 700,000 horse power at this point from both Canadian and American waters together. (Hearings before International Waterways Commission, Toronto, Feb. 8 and 9, 1910.) Deducting the possibilities of the Long Sault development, there is left of undeveloped water power in the State of New York all told but 400,000 horse power (300,000 horse power from undeveloped rivers

and streams and 100,000 horse power from the surplus waters of the canals). The present enormous plants at Niagara upon the American side develop only about 210,000 horse power. If the total 20,000 cubic feet per second of water diversion allowed us there by the treaty between the United States and Canada were all *efficiently* utilized, it has been estimated that 540,000 horse power could be developed. The Long Sault Company, a single corporation, therefore, had within its grasp the control of power within the State over twice as large as the present combined power developments at Niagara, and greater than the total amount of power available there under the treaty.

Maximum power developments at Niagara plus those on the Long Sault *could supply energy to move every wheel and furnish light to every municipality in the State.* But the power development at Niagara is limited. By treaty between the United States and the Dominion of Canada, we may take of the waters of the river above the Falls 20,000 cubic feet per second and Canada may take 36,000 cubic feet per second. Under the so-called Burton Act, passed in 1906, Congress regulated the diversion allowed on this side of the river and the Secretary of War issued permits to power companies totalling a diversion of 15,600 cubic feet per second. The Burton Act was from time to time extended in operation beyond its original limitation of three years. Since March 4, 1913, however, Congress has refused to extend it, upon the contention of the State of New York through its Governor, Congressional Representatives and its Attorney-General that

the National Government has control of waters within the State of New York only for the purposes of commerce and national defense — in all other respects the State has exclusive control and may proceed to perform its governmental functions of navigation improvement and water power conservation in accordance with any policy determined or yet to be worked out.

No limit is placed in the Long Sault act on the height of the dams, and as the fall from Lake Ontario to the foot of the rapids is but 80 feet and the fall in the rapids 45 feet, the company is enabled, by the construction of dams of very moderate height, to back the water many miles up stream. Dams of moderate height would back the water at least more than twenty miles, and incidentally increase the flow in the St. Lawrence Power Company's power canal, which leaves the river eight miles above the projected dams. The St. Lawrence Power Company is another subsidiary company of the Aluminum Trust and furnishes power for the Aluminum Company's present plant at Massena.

It might be argued, were the company limited to the use and development of the water power in and about Long Sault island, that the privilege granted is not exclusive, but when it is considered that the company is given the right to develop water power at and above said place, the conclusion is inevitable that an exclusive privilege is granted, the limitations of which, in respect to location, are not defined, and may be asserted by the company to prevent all others from enjoying a similar privilege, not only at, but above Long Sault island.

Not only may the company by the charter assert exclusive control over the waters for all those miles, but to make the exclusiveness more perfect it may demand a grant of land under water for the whole distance under the claim that all these waters and lands under water are, as recited in section 4, " necessary to the enjoyment " of the lands covered by the dams. By no possibility then, either before or after a grant of lands under water to the company, could the State, without injury to this charter, grant to others rights to use for any purpose whatever the waters around those islands or for miles up and down the river. Neither could another bridge, for the same reason, be constructed within these undefined limits.

Authority is likewise conferred upon the corporation to erect all structures that it may deem proper or useful for any of the purposes described, at any points on the south shore or the north shore of the St. Lawrence river, upon any of the three islands named, or between the islands or in the bed of the river, either independently or in connection with like works now erected, or to be erected, in so much of said river and the bed thereof as lies to the north or Canadian side of said international boundary line, and upon and adjacent to the northerly shore of said river.

The act, therefore, not only grants to the corporation the exclusive right to develop and utilize all the water power in and around Long Sault island, but also contemplates a more comprehensive, general and exclusive control of the waters of the St. Lawrence river at and near that vicinity, by the erection of dams and power houses on the American side in connection with like struc-

tures on the Canadian side of the river. If the Long Sault Development Company shall in the future be able, either through connections with a company or companies on the Canadian side, or by independent action, to obtain a similar grant of power on the Canadian side, there can be little question about the exclusive nature of the privileges and power it will thereby be permitted to exercise.

In addition to all this, it is important to note that the power granted is perpetual.

In view of the language above quoted and in the light of all of the facts at hand, the conclusion seems irresistible that the Legislature of 1907 intended and endeavored to grant to the Long Sault Development Company the exclusive right, either independently or in connection with another corporation or corporations, to control all of the water power that could be generated at that place in the St. Lawrence river and within a vague and undefined area " above that point," not only for the present generation, but in perpetuity.

Under this grant, if valid, succeeding Legislatures are prevented from granting privileges to any individual or corporation to utilize any of the water power at the Long Sault rapids. It may also, as before stated, be claimed by the Long Sault Development Company that, because of its right to utilize the water above Long Sault island, no grant can be made by the Legislature, at least for a great distance above the point in question, without impairing the charter of the Long Sault Development Company.

The company might also maintain that any structure hereafter authorized, above or below the location in question, which would in any wise

affect the hydraulic head or lessen in any degree the efficiency of any of the structures of the Long Sault Development Company, would financially damage, and thereby impair, the exclusive rights, powers and privileges which the Long Sault Development Company received from the Legislature.

The State contends that section 18 of Article III of the Constitution was adopted for the very purpose of preventing such grants as this. At the time when this amendment was adopted, in 1874, many of the available power sites within the State had been granted by the Legislature by special acts, with scarcely any revenue to the State.

The preservation to future generations of the water power not theretofore granted, and which was practically located in the two border streams, the Niagara and the St. Lawrence, was a vital, essential and important duty. By section 18 of Article III the people undertook to put an end to the granting of these exclusive privileges, and it is not unreasonable to conclude that they had in mind the undeveloped water power of these two great streams. In any event, it was plainly declared in that provision that no exclusive privilege, immunity or franchise should be thereafter granted by the Legislature.

The charter in question plainly violates this provision, when we consider the causes that led to the adoption of, and the purpose sought to be obtained by this amendment.

There are many decisions of the counrts interpreting this language of the Constitution, but none that we have been able to find which determine this question contrary to the conclusion reached.

The terms of the Constitution are so plain, simple and comprehensive as to leave little room for construction. Nothing can be added to or taken from the language employed to make more plain the object aimed at. That object, as provided by the language of the provision, and as uniformly interpreted by the courts, is twofold: (1) To prevent monopoly; (2) to leave open competition. Keeping these objects in view, there is little difficulty in applying the constitutional mandate to any given state of facts.

It is urged, upon the authority of *Matter of Application of Union Ferry Company,* 98 N. Y. 139, that a privilege, immunity or franchise is not exclusive within this provision of the Constitution, which does not, by its terms, prohibit the enjoyment of a similar privilege, immunity or franchise by some one other than the grantee. This is founded upon the language of the court in that case, to be found at page 153, which is as follows:

> "The exclusiveness prohibited is one which is created by the terms of the grant, not that which results from the nature of the property or right granted."

In that case the court was considering an act of the Legislature, passed in 1882, entitled "An act to provide additional ferry slips and facilities in New York city for the ferries running between Whitehall street in the city of New York and Brooklyn." At page 148 the court said:

> " The whole frame and context of the act are consistent with the view that its object was not to grant any privilege or franchise to

> the Union Ferry Company as a corporation, but as stated in the title of the act, to add to the ferry slips and facilities of the particular ferry which the company named was, at the time, operating."

The court further held, in sustaining the constitutionality of that act, that the additional facilities granted by the act would increase the capacity, not only of the grantee, but of all future lessees of the ferry, to meet the wants of the public, and that those increased facilities would be enjoyed by the grantee only under its lease from the city, and would terminate with the lease and pass to succeeding lessees, and that the property could not be used for any purpose except the exercise of the ferry franchise granted by the city, by those in whose hands that franchise might be from time to time.

The court placed particular emphasis upon the fact that the privilege was not exclusive in respect to the character of the rights granted, nor indefinite in respect to the time of its enjoyment, and pointed out as exempting the statute from the constitutional inhibition, that the right granted, even while enjoyed by the Union Ferry Company, could also be enjoyed by other companies, and at the termination of the lease of the Union Ferry Company, the particular right granted to that company would pass to a new lessee.

The facts of this case, it will be seen, immediately take it outside of the facts in the Long Sault case. The reasoning of the courts in the Union Ferry Company case is not antagonistic to the contention that an exclusive privilege was granted to the Long Sault Development Company.

At page 151 the court cites cases of exclusive privileges condemned by this provision of the Constitution, among them *Cayuga Bridge Company* v. *Magee,* 2 Paige, 116, in which case the charter of the Cayuga Bridge Company provided that it should not be lawful to erect any other bridge or establish any ferry within three miles of the place where the bridge of the company should be erected, or to cross the river within three miles of the bridge without paying toll.

If we apply that doctrine to this case it condemns the charter. While the act does not expressly provide that no other company shall enjoy the privileges of the Long Sault Development Company within the area covered by the grant, yet the terms of the grant itself make it impossible that any grant could be made by the State, or that any other company or any other individual, even the present riparian owners, could utilize the water for power purposes in that portion of the river.

There is no distinction in principle between the provisions of an act of the Legislature which expressly provide that there shall be no competition within a given area, and the provisions of an act would make it impossible that there should be. To hold that a different principle applies is to give an absurd construction to this most vital constitutional principle. Certain it is that the Union Ferry Company case is not authority for any such contention.

The case further cites, as an instance of an exclusive privilege, the decision of the court in *Mohawk Bridge Company* v. *U. & S. R. R. Co.,*

6 Paige, 554. In that case the Mohawk Bridge Company received a charter to cross the Mohawk. The charter prohibited ferries crossing the river one mile above and one mile below.

Suppose in that case the Legislature, instead of providing that no ferries should cross one mile above or one mile below, had made a grant to the Mohawk Bridge Company of the waters of the Mohawk and the bed of the stream, one mile above and one mile below. It is plain that such a grant would as effectively prevent other ferries from crossing within that area as if the statute expressly so provided.

We are well aware that, in the Union Ferry Company case, the Court of Appeals announced the principle that the right granted is not exclusive simply because it is impossible that any other person or corporation should enjoy that right, holding that, where it is important to the public interest that a privilege should be exercised by someone, the State must necessarily have authority to select the grantees, and that in such a case exclusiveness is not produced by the grant, but results from the nature of the thing granted.

That doctrine cannot be so extended as to protect a grant which, although in terms is not exclusive, yet in addition to the privilege granted, grants other rights and privileges and properties which, upon the face of the act itself, make the privilege exclusive.

That court instances, as supporting this construction, grants of charters to toll bridge companies, grants of land to railroad companies for depots, car yards, etc. These rights, of course, are to a certain extent exclusive, but the grant

of a right to build a toll bridge is based upon an obligation on the part of the company to serve the public by improving the highway over which toll is taken. The right granted is in return for a public service rendered, while the rights granted to the railroad companies to acquire depots, car-yards, etc., are necessary for the enjoyment of the franchise given to the companies, and that brings the case within an entirely different principle. In both these cases the use is a public one, and essential for the purpose of enjoying the charter granted by the State, and it is within the power of the Legislature to determine the necessity of the grant, and when it so determines, keeping within the line so clearly marked out by the court in the Union Ferry Company case, the grant is not violative of the Constitution.

In respect to toll bridges the franchise must necessarily be given to one person or corporation. It would be a physical impossibility that the franchise should be granted to two persons or corporations to maintain a toll bridge at the same point. The same reasoning applies in grants to railroad companies, in respect to depots, car-yards, etc. They must necessarily be exclusive or they cannot be granted at all.

This does not apply to the grant made to the Long Sault Development Company. Within the area covered by this grant several grants may be made. Different kinds of grants may be made, *i. e.*, grants to different persons or corporations to use all or a portion of the waters at this point; grants for a limited period of time; grants reserving to the State control of navigation; grants

of land under water, for commercial purposes, beneficial land grants to upland owners, etc.

The distinction is that, by reason of the grant to the Long Sault Development Company, it is impossible to make any other grant at a point where other grants would be possible, were it not for the terms of this grant.

It cannot be argued that such a grant escapes condemnation because the exclusiveness is not expressed in the terms but results from the nature of the grant. Such a construction would be putting a premium upon deception. Is it possible that this highly important constitutional privilege, which cannot be directly assaulted, can be undermined and circumvented by subterfuge? Is it possible that the Legislature, which is prevented from granting in terms an exclusive privilege, may nevertheless grant an exclusive privilege if the purpose be concealed? What the Constitution aims at is to prevent the granting by the Legislature of an exclusive privilege, no matter in what way, by what subterfuge, direct or indirect, the privilege be granted. It is a substantial right and not a technical one that is thus preserved to all the people. It should not be pared down or overthrown by any refinement of reasoning. It should be enforced according to the plain letter and spirit of the provision and should be held to prohibit the granting of an exclusive privilege, whether directly or indirectly made, whether contained in the language or concealed in the language of the act effecting the grant.

Where a constitutional prohibition against exclusive privileges exists, an exclusive privilege

or franchise cannot be granted except where the entire operation of the privilege constitutes a public service and the public interests demand that the public be served in that respect by one agency alone.

Slaughterhouse Cases, 16 Wallace 36.
New Orleans Gas Co. v. *Louisiana Light Co.*, 115 U. S. 650.
Louisville Gas Co. v. *Citizens' Gas Co.*, 115 U. S. 683.
New Orleans Waterworks Co. v. *Rivers*, 115 U. S. 674.
Detroit Citizens' Street Railway Co. v. *Detroit Railway*, 171 U. S. 48.
Russell v. *Sebastian*, 233 U. S. 195.
Gardner v. *Michigan*, 199 U. S. 325.
California Reduction Co. v. *Sanitary Reduction Works*, 199 U. S. 306.
City of Rochester v. *Gutberlett*, 211 N. Y. 309.

No one of the exclusive privileges granted by the Long Sault Act was in the public service. The navigation grant was not for the public benefit, but was a mere condition upon the use of the waters. (Point II.) Nothing in the grant of water power obligated the corporation to generate power for distribution to the public at large, but such grant ran to the corporation privately for "*carrying on* the manufacture of commodities *with the said power*" (§ 1, Charter, Record, p. 23). In this respect the grant was entirely unlike the grant recently before this court in *Mt. Vernon Co.* v. *Alabama Interstate Power Co.*, decided January 24, 1916, in which the public pur-

pose was "to manufacture, supply and sell *to the public,* power produced by water as a motive force."

The grant made to the Long Sault Development Company is in defiance of constitutional principles. It is exclusive within an undefined area. The powers granted are not in the interest of the public. It prevents competition; it creates a perpetual monopoly in language as effective as could possibly have been used by the Legislature. It is clear, therefore, that it violates section 18 of Article III of the Constitution of the State of New York.

POINT IV.

THE ACT OF 1907, THE LONG SAULT CHARTER, IS A PRIVATE BILL WHICH EMBRACES MORE THAN ONE SUBJECT AND IS DEFECTIVE AND DECEPTIVE IN ITS TITLE.

Article III, § 16, of the State Constitution provides that:

> "No private or local bill, which may be passed by the Legislature, shall embrace more than one subject, and that shall be expressed in the title."

The subjects embraced in the bill in question are as follows:

1. The creation of the corporation.
2. The construction, maintenance and operation of works at or near Long Sault island.
3. The development of power from the waters of the St. Lawrence.
4. Constructing and maintaining a bridge.
5. The manufacturing of commodities.
6. The levying and taking of tolls.
7. The erection of transmission appliances.
8. The granting of the title to the bed of the St. Lawrence river to the corporation.
9. The creation of an exclusive right in perpetuity, to the use of all the water power in Long Sault rapids, and to control absolutely all navigation at this point.

10. The provision for alleged reasonable and proper remuneration to the State for such exclusive privileges.

Members of the Legislature, from an examination of the title of this bill, would not expect to find such extraordinary and exclusive grants as contained therein. The title of the bill does not indicate that the right to take toll is given to the company; nor that the title to the bed of the St. Lawrence river is to be conveyed to the corporation; nor that control of navigation is parted with to the company; nor that there is no provision whatever in the act for the improvement of navigation; nor that as many bridges as desired may be built; nor that an international bridge may be maintained (rather the impression from the title is that a bridge may be constructed for the private use of the company from the mainland to one of the islands); nor that the company may use the waters in other places up the river, far removed from Long Sault Island. The title to the bill does not indicate that the charter granted is perpetual. The same criticism as to nondisclosure of perpetual rights granted applies in respect to the other provisions of the bill pointed out above.

In *Economic Power and Construction Company* v. *City of Buffalo,* 195 N. Y. 286, an act entitled "An act to incorporate the Economic Power and Construction company," included within its provisions a power to the company to operate tubes containing transmission wires under all streets, highways and public places, with power to exercise the right of eminent domain, and the authority to lease or sell all, or any part, of its franchise or property. The grant of the special franchise was broad enough to cover every civil

division of the State, and the court condemned the statute as unconstitutional under its defective title:

> "Does the title of the act give any notice whatever that within the act may be found a grant of a franchise to use the streets, highways and public places in conducting every business coming within the broadest conception of the 'creation, transmission and utilization of power,' not only in the city where the principal office of the corporation is to be located, but in every city, village and township throughout the state? We think not.
>
> The right to use the streets, highways and public places throughout the state without qualification or limit, read in connection with the power to lease or sell the whole or any part of the same to any other corporation, is so very extraordinary as to overcome every thought of the same being an incident to the incorporation of a power and construction company. The grant coupled with the right to traffic in such franchises without the consent of or compensation to municipalities is of such importance and value as entirely to overshadow the avowed subject of the act itself."

The Court of Appeals, in *Cox* v. *The State*, 144 N. Y. 396, declared unconstitutional, as violative of the provisions of the Constitution we are here considering, an act entitled "An act to authorize the drainage of marsh lands," which granted privileges of an important character, constituted a corporation, to which it gave power to reclaim and drain, from time to time, wet or overflowed lands and tidewater marshes on or adjacent to Staten Island and Long Island. Power was also

given to enter upon all lands and waters for the purpose of making surveys and to use and own the right and title of the State in and to all the lands under water that may lie within or between said dykes and the present shore line, upon the payment to the treasurer of the State of such sum of money as should be determined by a commission to be appointed by the Governor, to be a fair value of such lands under water and belonging to the State. The Court of Appeals said, at page 408, in speaking of this:

> "It created a private corporation and its operations affected four counties in the state. The subjects embraced in it were the creation of the corporation; the authority to drain and reclaim tide-water marsh lands; to levy and collect assessments; to exercise the power of eminent domain and the grant of lands belonging to the State. We have seen that the purpose of the act, as expressed in the title, was the authority to 'drain marsh lands,' Without inquiring whether any of these subjects are germane to, or so connected with the one expressed in the title as to escape the objection, it is quite clear that no citizen or member of the legislature would expect to find such an extraordinary grant from the state of lands under water in the body of a bill with such a title, and that is a fair test of the question."

See also the cases:

Cahill v. *Hogan,* 180 N. Y. 304, 309.
Mayor v. *Manhattan Ry. Co.,* 143 N. Y. 1, 23.
Queens Terminal Co. v. *Schmuck,* 147 A. D. 502, 508.
Montclair v. *Ramsdell,* 107 U. S. 147.
Blair v. *Chicago,* 201 U. S. 400.

The act of the Legislature condemned by the court in the Coxe case was not more clearly violative of the provision of the Constitution under consideration than the act incorporating the Long Sault Development Company. Nothing in the title, as we have before stated, indicates that the company is to become the owner of land under water; is to be permitted, in connection with other companies or acting independently, to bridge the St. Lawrence at that point; to have exclusive control in perpetuity of the waters in the vicinity of Long Sault island and above and below it; to charge toll, and to do the other numerous acts which, by the terms of the statute, it is permitted to do. For instance, the heading provides that one of the purposes of the act is "to improve navigation in the St. Lawrence," while there is nothing in the act to require the company to improve navigation, or to do anything more than is necessary to accomplish the purposes of its corporate existence, provided the navigation of the St. Lawrence is not injured. Many affirmative acts are to be performed by the company, every one in aid of its corporate purposes, not one for the improvement of navigation.

The title of the act contains more than one subject and is therefore in violation of Article III, § 16, of the State Constitution.

If but one subject may be embraced in a private bill and that subject must be expressed in its title, it follows that the title of the bill must necessarily involve one subject only.

The title of the Long Sault bill comprehends the following disassociated subjects, none of them

incidental to any other, which we might call the one and sole subject.

(1) The construction and maintenance of dams and power-houses to develop water power. This would be a sufficient title for an act which contained that one subject.

(2) The construction of canals and locks for the improvement of navigation. This is an entirely independent subject which is not necessarily connected with the construction and maintenance of dams, for canals may be, as they have been near these points, constructed around the rapids outside the bed of the river.

(3) The construction of a bridge. Surely this has nothing whatever to do with the maintenance of dams or the construction of locks and canals. It is by itself an entirely independent subject.

(4) The carrying on of the manufacture of commodities. This is another subject which is not allied at all with the construction of dams or of a bridge, the construction of canals and locks, or the development of water power.

There are at least these four independent subjects in the title of the Long Sault act which condemn it from that standpoint were we never to look into the body of the act to find therein a half dozen subjects not brought to light in the title. The title is by itself a confession of constitutional violation. The mandate of the Constitution is not only that you shall never have but one subject in the body of the act but also that you shall never have more than one subject in the title, however faithful the title may be in disclosing the contents of the bill.

A legislator cannot fairly grasp the purport of a bill if more than one subject is found in the

title. No legislator can be taxed with foreseeing from that part of the title of the Long Sault bill which gives the power to construct dams, the possibility of constructing dams not only in many places around Long Sault Island but also around Barnhart's Island and Sheik's Island as granted in the act, nor powers subsidiary thereto of constructing reservoirs, flumes, sluices, trunks, pipes, bulkheads, piers and other works appurtenant thereto. Nor, burdened with the above, can he be supposed to foresee also from the words in the title the possibilities of power houses, electrical transmission lines, the use of miles of flowing water, the construction of many bridges whose location like those of the dams, is nowhere disclosed, the building of canals and locks, and the possibilities of manufacturing commodities without number.

The Constitution therefore provided that the title also should embrace but one subject. The title was to be not simply a warning to the legislator of the chances of deception in the act, but an open submission to a reasonably discerning but actively pressed mind, of the contents of an act containing a single purpose.

We believe, therefore, that this bill violates both in its body and title section 16 of article III of the Constitution of the State.

POINT V.

THE GRANT OF LANDS UNDER WATER IN THE ST. LAWRENCE RIVER IS IN VIOLATION OF ARTICLE VII, SECTION 7, OF THE NEW YORK STATE CONSTITUTION, FORBIDDING THE LEASING OR ALIENATION OF LANDS IN THE FOREST PRESERVE.

The lands under water in the St. Lawrence river at Long Sault rapids are in St. Lawrence county.

By section 100 of chapter 332 of the Laws of 1893 the forest preserve is constituted as follows:

> "The forest preserve shall include the lands now owned or hereafter acquired by the State within the counties of Clinton, except the towns of Altona and Dannemora, Delaware, Essex, Franklin, Fulton, Hamilton, Herkimer, Lewis, Oneida, Saratoga, *St. Lawrence,* Warren, Washington, Greene, Ulster and Sullivan, except
>
> 1. Lands within the limits of any village or city and
>
> 2. Lands, not wild lands, acquired by the state on foreclosure of mortgage made to the commissioners for loaning certain moneys of the United States usually called the United States deposit fund."

The Constitution of 1894, in effect January 1, 1895, inserted the following provision with reference to these lands:

> "The lands of the State, now owned or hereafter acquired constituting the forest

> preserve as now fixed by law, shall be forever kept as wild forest lands. They shall not be leased, sold or exchanged, or be taken by any corporation, public or private, nor shall the timber thereon be sold, removed or destroyed."

A mere reading of the above section is a complete demonstration of its meaning. As the Court of Appeals said in *People* v. *Fisher,* 190 N. Y. 480:

> " The language of the statute thus specifying the lands which are included within the forest preserve *is clear and definite and does not in itself require construction.* Its plain and positive language is made even more certain by the fact that some exceptions are stated therein."

The Long Sault Company argues that the lands under water at this point could not possibly be wild lands because they are not covered by trees or forest growth. But the term " wild forest lands " does not comprehend only those lands covered with trees, for such a construction would exclude all cleared lands owned by the State within the actual forests and all lands in the actual forests in the beds of streams, lakes and rivers. There is no express exception in the Statute or Constitution excluding them, and clearly there is no intent to exclude them. The lands under water in the St. Lawrence river, like lands under water in the present forests, were wild forest lands hundreds of years ago and are to-day.

As mentioned by the court in the *Fisher* case, the exceptions in the statute materially aid us in interpreting the section. Lands in two towns in

the county of Clinton are excepted. No lands in any town of any other county are excepted. Lands within the limits of any village *or city* are excepted. There are no cities in the actual forests. They lie outside in open and cultivated territory. Accordingly it makes no difference that the lands under water in the St. Lawrence river lie in cultivated country ten or twenty or thirty miles outside the actual forests. Furthermore, no one would question that a piece of land acquired contiguous to the present forests would become a part of the forest preserve. Assuming then all territory to be so acquired, piece by piece, from the present forest line until we reach the St. Lawrence river, must they all be part of the forest preserve excepting only the last piece in the St. Lawrence river.

Open lands acquired, under foreclosure of United States Deposit Fund Loans, are by the statute excepted, so that those lands after foreclosure may still be deemed a part of that fund. All other open lands are not excepted.

Much was said by the plaintiff in error to the effect that the Forest, Fish and Game Commission and other legislative bodies of inquiry into forest preservation had never regarded these lands in the St. Lawrence river as part of the forest preserve. We cannot admit that they or the Legislature can place a binding interpretation on a constitutional provision defining what lands are included in the forest preserve, for the statute enumerating the lands became, by virtue of the constitutional provision, a part of the Constitution itself.

The Legislature may perhaps estop itself on a constitutional interpretation after years of

action by individuals upon an interpretation sanctioned by it, but the Legislature cannot in advance, or by one act of interpretation, construe a constitutional provision to the exclusion of a determination by the courts.

Moreover, it is not the fact that the Legislature, or the Forest, Fish and Game Commission, have ever construed the lands in the St. Lawrence River as not a part of the forest preserve. The act which created "The State Reservation on the St. Lawrence River" (chapter 802, Laws of 1896) and declared that the reservation should include "all that part of the St. Lawrence lying and being within the State of New York, with the islands therein," provided that such reservation should be under the control and management of the Board of Fisheries, Game and Forests, and that a superintendent to be appointed should have the powers of a game protector:

> "§ 2. The state reservation on the St. Lawrence shall be under the control and management of the board of fisheries, game and forest, who shall have the power to make and enforce ordinances, by-laws, rules and regulations for the management of the property of the state within the borders of said reservation, and for the orderly transaction of business not inconsistent with the laws of the state; to appoint a superintendent who shall be subject to the order of said board, who shall have the authority of a fisheries and game protector, and of a police constable in criminal cases within the limits of the state reservation.
>
> § 3. It shall be the duty of the said board of fisheries, game and forest to report to the next legislature of this state what laws, in their opinion, should be enacted for the gov-

> ernment and control of said state reservation, so as to make the same the most useful to the people of the state as a part of an international park upon the St. Lawrence river *comprising the whole of said river.*"

In the printed report of Lands in the Forest Preserve, issued by the Forest, Fish and Game Commission (1909), at page 5, in referring to certain parcels purchased by the State along the St. Lawrence river, it is said:

> "These lots, which were purchased by the State in 1897 and 1898 through a special appropriation for that purpose, are situated on various points or islands in the St. Lawrence river in the vicinity of the Thousand Islands. They are under the care and control of the Commission and though not wild or forest lands are properly a part of the Preserve."

The St. Lawrence Reservation was carved out of the Forest Preserve, as were all the other parks, Adirondack Park, Catskill Park, and John Brown Farm (see chapter 444, Laws of 1912), and in the original Forest, Fish and Game Law (chapter 20 of the Laws of 1912, § 218) we find the same phrase applied to the St. Lawrence Reservation as appears in the definitions of the Forest Preserve, namely: "All the lands now owned or hereafter acquired by the State, etc.," shall be known as the St. Lawrence Reservation."

Instances of land grants under water in rivers within Forest Preserve counties, during the years 1900 and 1901, are alluded to below by the plaintiff in error. We are not called upon to express an opinion as to their validity. It may be that such lands far removed from actual forest

lands are not within the spirit of the constitutional protection, as in the same spirit we would except lands in forest preserve counties acquired for an express purpose, state hospitals or barge canal construction for instance. But the St. Lawrence Reservation has always been by law defined so accurately and specifically as including these lands under water in the St. Lawrence river, and the Reservation has always and constantly been by law under the control of the Forest, Fish and Game Commission and the Conservation Commission, that there is no room for doubt about the constitutional spirit or the legislative intent against their alienation.

Finally as indicating with what strictness this section of the Constitution is to be construed, we direct attention to the recent amendment to the section proposed by the Constitutional Convention of 1915. The section was proposed to be amended by inserting a provision that the prohibition against alienation and use of the Forest Preserve lands should be limited so as *to permit the removal of dead and fallen timber,* the construction of fire trails *and the building by the State of a highway* from Saranac Lake to Old Forge.

At the close of the next point we will show that the land grant was tied up inseparably with the grant of the use of waters. One would not have been given without the other, and both are lost when the land grant falls.

POINT VI.

THE LONG SAULT ACT IS INVALID AND INOPERATIVE BECAUSE IT PROVIDES FOR THE ALIENATION BY THE STATE OF TITLE TO LANDS IN THE BED OF THE ST. LAWRENCE RIVER. THE TITLE OF THE STATE TO LANDS UNDER NAVIGABLE WATERS IS A SOVEREIGN OWNERSHIP RATHER THAN A PROPRIETARY TITLE, AND IN SO FAR AS ANY CONVEYANCE THEREOF WILL WORK A PUBLIC INJURY, THE LANDS ARE DEEMED TO BE AND ARE INALIENABLE. AS THE FRANCHISE TO USE THE WATERS WAS NOT INTENDED TO STAND WITHOUT THE LAND GRANT, THE FRANCHISE TO USE THE WATERS FALLS ALSO.

We again call attention to the fact that the act is in excess of the power of the Legislature — in undertaking to divest the people of the State of the title to the lands under the St. Lawrence.

The act in question provides that after Congress shall authorize the construction of the dams, locks and canals authorized by the act, and after the payment by said corporation into the treasury of the State of the fixed sum of $10,000, the Commissioners of the Land Office shall, upon application of said corporation, grant unto it the title and interest of the people of the State in and to the lands under the waters of the St. Lawrence river,

to be covered or occupied by said works and locks and power-house, etc.

Provision is herein made for the complete surrendering of the title of the people of the State to the company, upon its complying with the terms of the act. This neither the Legislature nor the Board of Land Commissioners has power to do.

The State holds such lands in trust for the benefit of the public and of that trust the State is powerless to divest itself. This doctrine has been clearly announced whenever the question has been before the courts, both in State and in Federal tribunals, and is not open to doubt. In the case of *Coxe* v. *The State*, 144 N. Y. 396, a case very similar to this, the court announced this principle in the following language:

> "The question is governed in this state by the rules of common law, modified in some respects by statute and adapted by the courts to such changes of conditions as existed here. That the dominion and ownership of such lands (under navigable streams) is in the sovereign for the benefit of the public has long been settled. Such dominion and ownership of property generally implies the power of absolute disposition, but with respect to the land under navigable or tide waters an important limitation has been engrafted upon this power from the nature of the soil. The title of the state to the seacoast and the shores of the tidal rivers is different from the fee simple which an individual holds to an estate in lands. It is not a proprietary, but a sovereign right, and it has frequently been said that a trust is engrafted upon this title for the benefit of the public of which the state is powerless to divest itself."

The same doctrine is set forth in *People* v. *N. Y. & S. I Ferry Co.*, 68 N. Y. 71, and by Chief Judge Bartlett of the New York Court of Appeals in the case here before the court (see Point II).

This court itself states the doctrine in *Illinois Central R. R. Co* v. *Illinois*, 146 U. S. 387. The court was there considering the validity of an act of the Illinois State Legislature, repealing a former act of the Legislature, which former act undertook to grant to the Illinois Central Railroad Company certain lands under the waters of Lake Michigan. Upon that point the court said:

> "The State holds the title to the lands under the navigable waters in trust for the people of the State that they may enjoy the navigation of the waters, carry on commerce over them and have liberty of fishing therein, freed from the obstruction or interference of private parties. * * * The control of the State for the purposes of the trust can never be lost except as to such parcels as are used in promoting the interests of the public thereon or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining. * * *
>
> The State can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them, so as to leave them entirely under the use and control of private parties except in the instance of parcels mentioned for the improvement of the navigation and use of the waters, or when parcels can be disposed of without impairment of the public interest in what remains, than it can abdicate its police powers in the administration of government and the preservation of the peace."

The Long Sault grant is not a grant for any public use or in which the public at large is interested, or by which the public is benefited. The public interest is, rather, impaired as we have shown in Point II. The grant clearly, therefore, contravenes the very nature of the State's sovereign control in this respect.

It may be argued that the question of the grant of lands under water is not important at present in that it does not arise until Congress has acted. An answer to that is, that the title is effectually lost by the terms of the act itself, and we are analyzing the action of the Legislature not the action of the Commissioners of the Land Office. The test of the constitutionality of a legislative act is not what has been, but what may be done under authority of its provisions.

Also it may be urged that the powers granted to the company being capable of full enjoyment without the grant of the title to the bed of the stream, therefore to that extent the act may be sustained.

For the purpose of meeting the latter suggestion, let us look at the influences which induced the Legislature to pass the bill. The Long Sault Company wanted something more than a mere revocable license to place their works in the river and to use the waters thereof. A bare privilege to use the waters of the river for power purposes would have been subject to the paramount right of the state to destroy it at any time in the improvement of navigation. An essential part of the project, so far as the company was concerned, was, therefore, the protection of the millions of dollars proposed to be invested in the works,

through the ownership of the soil beneath them. The Legislature, on the other hand, in the belief that the bill provided for the improvement of navigation in the public interest, was bestowing a commerce grant of lands upon the company.

Had the Legislature been aware at the time that the act it was passing was beyond its power, for the reason that the Legislature was unlawfully surrendering the control over navigation, and as another step toward the same end, it was attempting in the supposed interest of navigation an illegal grant of lands under water, it is safe to presume it never would have granted the franchise to use the waters.

In the leading case of *Warren* v. *Mayor*, 2 Gray, 84, where the Legislature sought to annex Charlestown to Boston and failed to protect until the annexation should finally be made the rights of the inhabitants of Charlestown to elect representatives in Congress, the court, Chief Justice Shaw writing, after deciding the statute to be unconstitutional for this lack of protection to the citizens of Charlestown, declares that the whole annexation scheme should fall, since it could not be expected the Legislature would intentionally force the annexation to the detriment of these rights.

> "But if they (parts of the same act) are so mutually connected with and dependent on each other, as conditions, considerations or compensations for each other, as to warrant a belief that the legislature intended them as a whole, and that, if all could not be carried into effect, the legislature would not pass the residue independently, and some parts are unconstitutional, all the provisions which are thus dependent, conditional or connected, must fall with them."

In the case of *People ex rel. Purdy* v. *Commissioners of Highways,* 54 N. Y. 276, a provision of a statute appropriating State lands for the purposes of a local highway, was held void for not having received a two-thirds vote of each branch of the Legislature. The court refused to compel the commissioners, pursuant to other provisions of the act, to proceed with laying out the road. At page 278 the opinion reads:

> " It is not important in this case to decide whether, by force of the constitutional provision, the whole of every such bill is to be deemed inoperative as law in case any part of it contains such an appropriation, and the bill has not been passed in conformity with the constitutional requirement, or whether the provision may be satisfied by the rejection of that part only of such an act as makes an appriation. In this case, the grant to the town of the public land is so important a part of the whole provision that it cannot be doubted that, in the contemplation of the legislature, it was an essential and fundamental portion of the act, without which the bill would not have been passed at all."

"An act to incorporate the Tidal Waters Way Company and to define its rights, powers and privileges " was held violative of the fundamental law in *Queens Terminal Co.* v. *Schmuck,* 147 A. D. 502, because it gave power to erect buildings, wharves, and docks, and to acquire a strip of land one thousand feet in width on either side of the canal, neither of which grants the court could perceive were for a public use. The *entire* act was quashed.

> " Nor is it possible in this case to separate those portions of this act which are in conflict

> with constitutional provision from those which might, if existing independently, escape such condemnation, permitting the latter to survive. The act not only defines the powers of petitioner but gives to it corporate life. The Legislature might never have been willing to grant it existence if it had understood that it could not possess the powers which we have determined to be invalid " (p. 509).

See also *State* v. *Commissioners of Perry County,* 5 Ohio St. 505.

Granting, for the purpose of argument, that the Long Sault act, with the land grant taken out, would stand more to the advantage of the State, we cannot on that account uphold the remainder of the act. In *Slawson* v. *The City of the Racine,* 13 Wis. 398, the Legislature annexed certain outlying, sparsely settled districts to the city of Racine, and, for the reason that they were in their nature farming lands, provided that the lands should be taxed at a different rate than other lands in the city. The provision was held unconstitutional and, though the municipality would have benefited by the taxation of these lands at the same rate as other lands, the court refused the whole act operation on the theory that the Legislature intended the lessening of taxation to be compensation for the annexation.

> " There is no doubt that in many instances, by the annexation of farming lands to a city, hardships are inflicted upon their owners by the increased rates of taxation to which they are subjected. If they are annexed, they must be taxed as other lands in the city, and that is a matter proper to be considered by the legislature in determining whether they shall be annexed. In this act it is evident the legisla-

ture had it under consideration, and that they annexed these lands with the idea that they might protect them against such hardships by a proviso for a less rate of taxation. The proviso was clearly intended as a compensation for the annexation, and stronger language could not well be selected to show that the legislature intended the one to be subject to the conditions stated in the other, and that they would not have annexed these lands unless they had supposed that effect could be given to the proviso " (p. 404).

Should the legal parts of a bill have only a partial influence upon the passage of the whole, the entire act will be denied operation.

" It remains to be considered what effect the unconstitutional provisions of said sections 36 and 37 have upon the remainder of the act of which they form parts. The rule is a familiar one that when the valid and invalid portions of the legislative enactment are capable of being separated, and the valid part is a complete act, and not dependent upon that which is void, the latter alone will be rejected, and the rest sustained, if it is manifest that the void part was not an inducement to the legislature to pass the part which is valid, but, if it is manifest from any inspection of the law itself that the invalid portion formed an inducement to its passage, the entire act will fall. * * * It is not necessary that the invalid portion of an act of the legislature should have operated as the sole inducement to the passage of the law, to render the same void. It will have that effect if the void part to any extent influenced the legislature in passing the statute." (State ex rel. Cornell v. Poynter, 59 Neb. 417, 434, 81 N. Y. 431.)

The above rule will upset the argument that the money consideration to be paid the State was a sufficient inducement for the grant of the right to use the waters. In truth, the money consideration had no weight whatever with the Legislature, for they passed the bill without it (Senate Printed Bill No. 1137, 1907) on the strength of the public benefits hoped to be accomplished, and it was the Governor who insisted, on returning the bill, that some money compensation to the State should be inserted.

The Long Sault act, we have a right to assume, was not passed for the mere purpose of conferring a water-power privilege involving a money return to the State. If, with the unconstitutional commerce grants stricken out, the bill emerges into such an act, the result is something the Legislature never intended and the courts will never enforce.

Manhattan Savings Institution v. *Mayor*, 90 N. Y. 48.

Pollock v. *Farmers Loan and Trust Co.*, 158 U. S. 601, 637.

Connolly v. *Union Sewer Pipe Co.*, 184 U. S. 565.

In conclusion, we believe the act should be condemned because of the provision which provides for the grant of the sovereign title of the State to the company. The act cannot survive as a grant to use the waters of the St. Lawrence river, for that special franchise was inseparably connected with the land grant, which is void both as being in excess of the powers of the Legislature in its sovereign control over land under navigable waters, and as in violation of the forest preserve section of the Constitution.

POINT VII.

THE PROVISION IN THE ACT OF 1913, CHAPTER 452, FOR THE REPAYMENT TO THE LONG SAULT COMPANY OF SUMS PAID INTO THE STATE TREASURY, DOES NOT CONSTITUTE A GIFT OF THE MONEYS OF THE STATE, NOR AN AUDIT OF A PRIVATE ACCOUNT BY THE LEGISLATURE, NOR AN APPROPRIATION OF PUBLIC MONEYS REQUIRING A TWO-THIRDS VOTE OF THE LEGISLATURE.

The Eighth Point of the brief of plaintiff in error is devoted to the proposition that in so far as the Repealing Act authorizes the State Comptroller to repay to the Company the sums paid by it into the State treasury under the Act of 1907, the Repealing Act is void in that it offends against the provisions of the State Constitution, which declare (1) that neither the credit nor the money of the State shall be given to or in aid of any corporation, (2) that the Legislature shall neither audit nor allow any private claim or account against the State, and (3) that the assent of two-thirds of the members elected to each branch of the Legislature shall be requisite to every bill appropriating the public moneys or property for local or private purposes.

Similar repayments, however, have been held in other instances not to be an appropriation of public funds, nor a gift of State moneys, nor an audit of a private claim, but rather simple acts of justice upon the part of the State; and such repay-

ments have been construed as not offending any of the constitutional provisions alluded to by the plaintiff in error.

Lehigh Valley Railroad v. *Canal Board,* 204 N. Y. 471, 475.
Waterloo Woolen Mfg. Co. v. *Shanahan,* 128 N. Y. 345, 360.
People ex rel. Cayuga Nation v. *Land Commissioners,* 207 N. Y. 42, 51.

POINT VIII.

THE REPEAL OF THE LONG SAULT CHARTER LEAVES THE COURTS WITHOUT A STATUTE UPON WHICH TO BASE A WRIT OF MANDAMUS. THERE IS NO LONGER ANY DUTY TO RECEIVE THE MONEY IMPOSED UPON THE STATE TREASURER.

That this proceeding for mandamus survived the Repealing Act was not necessarily determined by the decision of the Court of Appeals. On the ground that public policy and necessity required an immediate determination of the legality of the Long Sault franchise the Court of Appeals proceeded at once to a determination of that question, disregarding procedural objections. The determination of the Court of Appeals that the charter was unconstitutional obviously carried with it a determination that all the charter provisions, including those directing payments to the State Treasurer were inoperative. But should that court have come to the conclusion, or should this court come to the conclusion that chapter 355 of the Laws of 1907, the Long Sault charter, was constitutional, then it becomes necessary to inquire whether any power in the company to pay $25,000 to the State Treasurer or any power in the State Treasurer to receive the moneys, has survived certain other definite provisions of the Repealing Act which may be valid despite the un-

constitutionality of those sections of the Repealing Act impairing the company's franchise rights.

Wholly aside from the contention of vested contract rights to construct dams and use the waters of the St. Lawrence river for power purposes, there can be no dispute about the fact that the Long Sault Development Company has ceased to exist as a corporation. All special acts creating corporations passed pursuant to article VIII, section 1, of the New York Constitution, may, by reservation in that section, " be altered from time to time or repealed." Even assuming the Repealing Act is unconstitutional so far as it attempts to repeal alleged vested contract rights, yet a repealing clause attached to an unconstitutional act, will be held effective if an attempt to have it operate, apart from the other provisions of the statute, is clear.

Meshmeier v. *State*, 11 Ind. 482.
State v. *Blend*, 23 N. E. 511.

In the case of *Meshmeier* v. *State*, above, the court says at page 490:

> " We know of no rules of judicial interpretation that would authorize us to declare that a plain and positive legislative enactment was intended by the legislature to have effect only upon the condition that other enactments should be held valid, unless such intention is expressed or fairly implied. We must presume that the legislature, in framing the act of 1855, intended so to frame it as that it should all be constitutional and valid. *If, when they enacted the repealing clause, they believed the entire act valid, and intended to repeal all laws inconsistent with its provis-*

ions, such repeal must be effectual, whatever may be the fate of the balance of the act.''

Nothing could be more plain than the intent of the Legislature in our case to repeal chapter 355 of the Laws of 1907, despite the fact that they might fail to destroy the special franchises.

> '' § 4. The enumeration in this act of the grounds for said repeal shall not be deemed to qualify or impair the full force and effect of the repeal.''

The Long Sault Company has been deprived of corporate life by the authority which conferred it. The company cannot take one step in continuance of or in preparation for the objects of its creation; and so were mandamus granted the company could not act, for there is no company to act, and no power surviving whereby it could pay into the State Treasury the $25,000. By the repeal bill the Comptroller is directed to return to the company the moneys theretofore paid by it into the State Treasury, and

> '' such Company is continued in existence for the purpose *only* of receiving and giving proper vouchers for said moneys, and making proper distribution or application thereof among its members or other persons entitled thereto and the winding up of its affairs.''

Whatever property, contract rights or franchises were lawfully belonging to the company, these the courts will in appropriate proceedings protect for the benefit of the creditors and stockholders, but the corporation itself, with all its hopes and business prospects, is gone. The Legis-

lature has utterly deprived the corporation of its franchise to be a corporation, to transact business or to perform *any act* set forth in its charter.

People v. *O'Brien*, 111 N. Y. 1.
Mayor v. *23rd St. Railway Co.*, 113 N. Y. 311, 317.

The plaintiff in error has gathered cases from other jurisdictions, but none from the State of New York, to show that the " winding up " of a corporation's affairs includes the further prosecution of actions begun by it. Likely enough the pressing of a corporation's claims against its debtors, or a defense against alleged creditors, may be an important part of the winding up of its affairs. The State of New York, however, on the one hand, never was a debtor in respect of the payment of this $25,000, and, on the other hand, is not only not a creditor seeking the money, but is actually opposing its payment.

The question of preservation of legal actions for the benefit of a corporation is always one so essentially of the intent of the repealing statute, that general statements in other cases are of no practical help, and we have not searched in that direction, but content ourselves with an analysis of the Repealing Act and its accompanying statute, together with the circumstances preceding their passage, all of which we feel certain disclose a clear purpose to put an end to these mandamus proceedings.

Efforts of the Long Sault Company to prevent a repeal of its charter were well known to the Legislature. Arguments were presented in written form to the Legislature, protesting against the

repeal and reciting that the question was now before the courts. The refusal of the State Treasurer to accept the payment for 1912, and the consequent proceedings for mandamus in the Third Judicial Department at Albany raising the constitutionality of the act, were matters of which the Legislature must have been aware.

By a word or two in the act, the Legislature might have easily preserved these mandamus actions for the very purpose of having an *early* determination of the constitutional questions. Nothing of the kind was inserted; instead chapter 453 of the Laws of 1913 expressly reserved to the State the right to present later the unconstitutionality of the grants, as a defense when the company's franchise claims were presented to the Court of Claims.

> "§ 2. Nothing herein contained shall be regarded as conceding the validity of any of such alleged claims upon the part of the state growing out of the enactment by the legislature of chapter three hundred and fifty-five of the laws of nineteen hundred and seven, and by the repeal of said statute, nor as waiving, on behalf of the state, any defense thereto."

The Comptroller is directed to cause the return of *all sums* paid by the company into the State Treasury. The sum appropriated for this purpose is just sufficient to pay back all moneys received by the State, *not including the payment for 1912.* Surely the intent of the statute is, that the treasurer has no longer authority to receive, and the company is without power hereafter to pay any further moneys to the State. Bearing

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in mind, (1) that the Comptroller cannot accept any further moneys, and (2) that no provision is made for the repayment of the $25,000 should the company succeed in this action, the intent is quite plainly indicated that the proceedings in mandamus were to be cut down where they stood.

We do not overlook section 94 of the General Construction Law which saves, unless otherwise provided by law, all actions and proceedings commenced prior to the repeal of a statute upon which they are founded. The slightest intent, however, is sufficient to take a statute outside the provisions of this section, for the section has not the authority of a constitutional provision, and one Legislature may not bind a subsequent Legislature in this regard unless of course the latter body prefer by nonexpression of a different view to abide by the prearranged construction. Section 110 of the General Construction Law itself provides:

> "This chapter is applicable to every statute unless its general object, or the context of the language construed, or other provisions of law indicate that a different meaning or application was intended from that required to be given by this chapter."

And the courts have been very ready to deny the operation of the General Construction Act when there is any reason to believe that its operation would run counter to the legislative intent.

People v. *Woodbury Dermatological Inst.*, 192 N. Y. 454.
Palmer v. *Hickory Grove Cemetery*, 84 App. Div. 600, 606.
Schnaier v. *Grigsby*, 132 App. Div. 854.

In repealing the Long Sault bill the Legislature has enacted a special statute affecting only a special statute. There were no situations and rights unknown to it which it might have left to the General Construction Law to preserve. The whole force of the Repealing Act was aimed at the Long Sault Development Company and its rights asserted or to be asserted in the courts. We perceive an intent to annihilate rather than to preserve any action brought while the statute was in force.

It would be, moreover, somewhat absurd, to consider the Legislature as desiring to preserve by the Repealing Act, or by the General Construction Law, rights or causes of action which it believes the company never lawfully possessed because the entire charter, including all action under it, was unconstitutional.

In determining that a certain statute was intended to apply to situations antecedent to its passage, the Court of Appeals in *People ex rel. Collins* v. *Spicer*, 99 N. Y. 225, 233, remarks:

> "In looking for the intent of the legislature, not only the language of the statute may be resorted to, but also the circumstances which occasioned its enactment and the object professed in its title, and if by these aids the intent of the act can be clearly ascertained, effect may be given to it although so retrospective words are contained in the law."

Having sought to demonstrate that the Legislature meant to terminate these proceedings, we are brought to a consideration of its power to do so viewed from the standpoint of impairing contract rights, for it is certain that whatever in-

jures the mode of enforcement of a contract impairs the obligation of a contract.

A contract is defined in *Dartmouth College* v. *Woodward*, 4 Wheaton, 518, 656, as follows:

> "What is a contract? It may be defined to be a transaction between two or more persons, in which each party comes under an obligation to the other, and each reciprocally acquires a right to whatever is promised by the other."

Under the Long Sault act the State acquired a right to the money promised by the company. The right was on the State's side, the duty on the company's. We are unable to conceive of such a thing as a vested right in a duty to pay $25,000 to the State Treasurer.

Because the corporation was given power to sell or transfer its franchise to use the waters to anyone whomsoever, the Long Sault Company argues that the acceptance of this money by the State Treasurer is still necessary for the protection of the value of the franchise and property rights, regardless of the fact that the corporation itself is not existent.

Were this true, and were it admitted that non-impairment of the buying public's confidence in the company's special franchise is a right which may draw legal protection, we would still be confronted with the fact that mandamus is not the remedy to compel performance of a contract. The mandamus proceedings rested, and rested alone, on the obligation of a State officer to perform his duty under a statute. There is now no statute under which the State Treasurer may receive the money. There is no longer any duty imposed by law upon him which he can fulfill or resist.

Proceedings pending under a statute cannot proceed after a repeal of the statute if the statute repealed will be necessary to support the judgment. As was said in *Vance* v. *Rankin,* 192 Ill. 625, 62 N. E. 807:

> "Pending judicial proceedings based upon a statute cannot proceed after its repeal. This rule holds true until the proceedings have reached a final judgment in the court of last resort, for that court, when it comes to pronounce its decision, conforms it to the law then existing, and may therefore reverse a judgment which was correct when pronounced in the subordinate tribunal from whence the appeal was taken, if it appears that pending the appeal a statute which was necessary to support the judgment of the lower court has been withdrawn by an absolute repeal."

People ex rel. Reynolds v. *Common Council of Buffalo,* 140 N. Y. 300, cited by the plaintiff in error at page 164 is not an answer to the argument that a right of action by mandamus has been lost to the Long Sault Company. In the case cited the proceedings under a statute were completed and had ripened into *a judgment* before the repeal of the statute. The right of the relator in that case to a writ of mandamus to compel the city authorities to audit and pay his judgment rested not upon the statute repealed but upon other statutes, making it the duty of the city authorities to audit and pay lawful claims against the city.

This court cannot direct mandamus, for there is no longer a statute authorizing the Long Sault Company to pay and the State Treasurer to receive the payment of $25,000.

THE WRIT OF ERROR SHOULD BE DISMISSED OR THE JUDGMENT OF THE SUPREME COURT OF NEW YORK STATE RENDERED ON THE REMITTITUR FROM THE COURT OF APPEALS SHOULD BE AFFIRMED.

E. E. WOODBURY,
Attorney-General, Attorney for the State Treasurer, Defendant in Error.

MERTON E. LEWIS,
C. T. DAWES,
Of Counsel.

OCT 28 1916
JAMES D. MAHER
CLERK

Supreme Court of the United States

OCTOBER TERM, 1916.

No. 49.

LONG SAULT DEVELOPMENT COMPANY, *Plaintiff in error,*

vs.

HOMER D. CALL (as Successor of John J. Kennedy), as Treasurer of the State of New York

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK

BRIEF ON REARGUMENT FOR DEFENDANT IN ERROR

E. E. WOODBURY,
Attorney-General,
MERTON E. LEWIS,
C. T. DAWES,
Attorneys for Defendant in error.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1916.

No. 49.

LONG SAULT DEVELOPMENT COMPANY, Plaintiff in Error,

against

HOMER D. CALL (AS SUCCESSOR OF JOHN J. KENNEDY), AS TREASURER OF THE STATE OF NEW YORK.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

BRIEF ON REARGUMENT FOR DEFENDANT IN ERROR.

POINT I.

THIS COURT WILL NOT TAKE JURISDICTION. THE STATE COURT DID NOT GIVE EFFECT TO SUBSEQUENT LEGISLATION.

" Giving effect " to subsequent legislation is not, we understand, simply arriving at a result which happens to be the same result as would follow if subsequent legislation were applied, but

rather it is using, relying upon, giving life, vitality and force to the subsequent legislation.

The Court of Appeals openly declined to give any force to the repealing act. Chief Judge Bartlett in the opinion puts that act aside, and starts with the fundamental step in his reasoning that the repealing act is powerless to defeat contract rights. He says (p. 69 Record.) "The repeal *could not operate* to confiscate any valid franchise or property right which the Long Sault Development Company had previously acquired under the act repealed," and he then proceeds to test the constitutionality of the charter. Surely after that frank statement, namely that the Court of Appeals was prepared to protect contract rights of the Long Sault Company if such rights existed, we should have to accuse that court of deliberate falsehood and design if we now conclude that it actually did give effect to the repealing act in an effort to destroy the company's contract rights.

"The *purpose* of this litigation is *to test the constitutionality of an act of the legislature passed in* 1907 to incorporate the Long Sault Development Company and grant it an important franchise on and in the St. Lawrence river," said Chief Judge Bartlett (Record p. 67), and he stated the precise truth. The Long Sault Company brought this proceeding long before the repealing act was passed, and thus *itself asked*, and the very purpose of the proceeding was to ask, *the State courts to test the constitutionality of its charter.* Having asked a constitutional construction of its charter of 1907, and having received it from the State courts, it now points

the finger of accusation at the judiciary stating that our highest court was not only influenced in its determination by legislative action but that the court actually used that legislation as a means of destroying the company's rights.

If the State had brought action against the Long Sault Company subsequent to the repealing act to obtain a decree declaring the company's charter of 1907 void, there might be possible ground for proclaiming that " it was the aim of the suit * * * to give vitality and operation to the subsequent law " (Louisiana Ry. & Nav. Co. v. New Orleans, 235 U. S. 164, 170). But here the Long Sault Company itself instituted the proceeding *before* the passage of the repealing act, and forced the State on the issue of the constitutionality of its charter into every court original and appellate. It obtained in the Court of Appeals a decision upon the exact question it sought from the beginning to have determined, the constitutionality of its charter. The decision being adverse, it seeks a review here on an assertion which is not supported by the record or by any inference obtainable therefrom, i. e., that the Court of Appeals refused to determine the constitutionality of its charter, but arbitrarily and relying upon legislative acts rather than judicial reasoning destroyed the company's charter rights.

[Moreover under the only interpretation of the repealing acts which we have, that of the Appellate Division, those acts even if given effect would not have operated to impair contract rights received under the Long Sault charter, for the Appellate Division determined that the repealing acts

expropriated the property and franchises of the company. Therefore the repealing acts even should they have been enforced would not in the view of the Appellate Division have impaired the contract rights, and the jurisdiction of this court therefore would not have attached.]

Upon the previous argument this court asked counsel for the company whether upon the jurisdictional question it relied upon the case of Terre Haute, etc., R. R. Co. v. Indiana, 194 U. S. 579, wherein it was held that:

> "Where the state court has sustained a result which cannot be reached except on what this court deems a wrong construction of the charter without relying on unconstitutional legislation this court cannot decline jurisdiction on writ of error because the state court apparently relied more on the untenable construction than on the unconstitutional statute." (Headnote.)

In that case a provision in the charter of a railroad company provided that the Legislature *may* so regulate tolls that not more than a certain percentage be divided as profits to the stockholders and the surplus shall be paid over to the State Treasurer for the use of common schools. Thereafter and before the Legislature regulated any tolls or called for any profits, the charter was surrendered, the company subjecting itself to the general railroad law of the State which contained no such provision. By acts of the Legislature subsequent to that surrender the State attempted to make the company account for profits previous to the surrender of the charter, declaring such profits to be debts owing by the company to the

State and decreeing that all liabilities to the State under special charters were and should be reserved notwithstanding the *past* or future acceptance of the surrender of such charters. The highest court of the State decided that the word "may" was mandatory, that the surplus profits earned before the surrender of the charter were due to the State although the Legislature had not regulated the tolls or called for the profits, and ordered the railroad company to turn over these moneys to the State. It was so apparent to this court that the State court had enforced the subsequent unconstitutional laws, since the authority for bringing the suit rested entirely on this subsequent legislation, that it declined to follow the State court in the interpretation of the charter provision. This court said:

> "The state court has sustained a result which cannot be reached, except on what we deem a wrong construction of the charter, without relying on unconstitutional legislation. It clearly did rely upon that legislation to some extent, but exactly how far is left obscure. We are of opinion that we cannot decline jurisdiction of a case which certainly *never would have been brought* but for the passage of flagrantly unconstitutional laws, because the state court put forward the untenable construction more than the unconstitutional statutes in its judgment. To hold otherwise would open an easy method of avoiding the jurisdiction of this court." (p. 589.)

In the case now before this court subsequent legislation is not relied upon to give authority for this suit. No "right to maintain the suit is

dependent upon subsequent act." (Cross Lake Fishing Club vs. Louisiana, 224 U. S. 632, 639) as it was in the Terre Haute case. The Long Sault suit would have been brought and *in fact was brought before the passage of any subsequent legislation.* No authority was drawn from the repealing acts and the decision of the Court of Appeals did not involve the support or defeat of those acts except as it showed collaterally whether those repealing acts by the Legislature were themselves constitutional.

Since all that is involved in this case is the judgment of the Court of Appeals untrammeled by the repealing act, this court will of course refuse jurisdiction. In New Orleans Waterworks Company vs. Louisiana Sugar Refining Company, 125 U. S. 18, at page 30, quoting from 12 Wallace 379, this court observed:

> " We are not authorized by the Judiciary Act to review the judgments of the state courts, because their judgments refuse to give effect to valid contracts, or because those judgments, in their effect, impair the obligation of contracts. If we did, every case decided in a state court could be brought here, where the party setting up a contract alleged that the court had taken a different view of its obligation to that which he held."

It is only where a long line of decisions of a State court has established a rule of property for that State, that the Supreme Court of the United States will take jurisdiction on an abrupt departure from that ruling by the State courts. The last judgment of the State court is then probably regarded as subsequent (judicial) legislation.

(Muhlker v. Harlem R. R. Co., 197 U. S. 544, 570.) This court has more recently thrown doubt upon its power to review even in such an instance (Cross Lake Fishing Club v. Louisiana, 224 U. S. 632, 639):

> "But if there be no such (subsequent) law, or *if no effect be given to it by the state court,* we cannot take jurisdiction, no matter how earnestly it may be insisted that that court erred in its conclusion respecting the validity or effect of the contract *and this is true even where it is asserted, as it is here, that the judgment is not in accord with prior decisions on the faith of which the rights in question were acquired.* Knox v. Exchange Bank, 12 Wall. 379, 383; Central Land Co. v. Laidley, 159 U. S. 103, 111–112; Bacon v. Texas, 163 U. S. 207, 220–221; Turner v. Wilkes Co., 173 U. S. 461; National Mutual Building and Loan Ass'n v. Brahan, 193 U. S. 635, 647; Hubert v. New Orleans, 215 U. S. 170, 175; Fisher v. New Orleans, 218 U. S. 438; Interurban Railway Co. v. Olathe, 222 U. S. 187."

The facts and the decision in the Cross Lake Fishing Club case above referred to are very pertinent to the question of jurisdiction in the Long Sault case. The suit there was brought by the State of Louisiana against the Fishing Club to recover 11,000 acres of land of which the Fishing Club was in possession claiming title under a deed from the Board of Commissioners of the Caddo Levee District. The State of Louisiana had in 1892 enacted a statute conveying to the Commissioners of the Levee District all lands belonging to the State within the limits of the District whether the said lands were originally

granted by the Congress of the United States to the State of Louisiana or were acquired by the State through tax sales. Then followed a provision for a conveyance of the lands to the Levee Commissioners from the Auditor of the State Land Office. No conveyance of the lands (sold by the Commissioners of the Levee District to the Fishing Club) was ever executed to the Levee Commissioners by the Auditor of the State Land Office, and it was asserted by the Fishing Club that no conveyance was necessary, as the lands came to the State through a swamp land grant by Congress, and the provision of the act of 1892, directing a conveyance of lands by the Auditor of the State Land Office to the Levee Commissioners, applied only to lands acquired through tax sales and not to lands conveyed to the State by Congress, which latter lands, the act of 1892, it was claimed, granted *in praesenti* to the Levee Commissioners. If that contention was correct the deed by the Levee Commissioners to the Fishing Club was valid, for the Commissioners had title, otherwise the deed was void. In 1902 the Legislature of Louisiana *passed a subsequent act which repealed the act of* 1892 *specifically as to the* 11,000 *acres of Fishing Club lands* and as to no other lands, and expressly declared therein that the act was repealed as to the Fishing Club lands in question because no instrument of conveyance from the State to the Levee Commissioners had ever been executed. This was a repealing act precisely like the Long Sault repealing act. The Legislature of Louisiana formed a conclusion that the claim of the Cross Lake Fishing Club to the lands was void under the statutes,

and placed that conclusion in the form of legislation.

When the suit was before the State court, that court mentioned the repealing act, but proceeded to determine that the act of 1892 was not a grant *in praesenti* and that a conveyance from the Auditor of the State Land Office was essential to vest title in the Levee Commissioners. In other words the State court defeated the Fishing Club upon an interpretation of the original State statute without reliance upon the subsequent repealing act. This court refused to take jurisdiction. In the course of the opinion it was said:

> " The record does not disclose that there was any reliance upon that act (repealing act) in the Supreme Court, and yet it was practically conceded in argument here that there was. But, whether relied upon or not, the act was mentioned in the statement preceding the court's opinion and *was not otherwise noticed or treated as a factor in the decision.* The court held that the act of 1892 was not a grant *in praesenti;* that a conveyance from the Auditor and Register was essential to invest the Board with any disposable title; and that, in the absence of such a conveyance, the sale and deed by the Board were wholly unauthorized and void. * * * (p. 637).
>
> It is most earnestly insisted that, even conceding that our jurisdiction is as restricted as just stated, it still includes the present case, because the decision of the state court, although not expressly rested upon the act of 1902, by necessary implication gave effect to it; and in support of this position it is said that but for that act the State could not have maintained the suit. But *we do not understand that the State's right to maintain*

> *the suit was dependent upon that act, nor do we perceive any reason for believing that the act was an influential, though unmentioned, factor in the decision.* Under the construction given to the act of 1892 the State still held the title, no conveyance having been made to the Board of Levee District, and, of course, the right to maintain the suit was appurtenant to the title.
>
> What has been said sufficiently demonstrates that no effect whatever was given to the act of 1902 and therefore that the case presents no question under the contract clause of the Constitution; and, as there is no suggestion of the presence of any other Federal question, the writ of error is dismissed." (pp. 639–40.)

We believe the above case is identical with the present Long Sault case. What was presented in each instance was the question of the existence of a *State contract.* There were repealing acts in both instances aimed at the grants. The State court was obliged to mention the repealing act, but honestly and fairly placed its decision upon an interpretation of the statute or Constitution under which the *State contract* was attempted to be made.

We say honestly and fairly placed its decision upon the original act. Should it clearly appear that the State Legislature of New York had the power to do what the Court of Appeals of that State has declared the Legislature had no power to do, and that the Court of Appeals utterly misapprehended the extent of legislative power under the Constitution, then of course the decision is open to the charge of dishonesty as having been decided under cover of and at the instance of the

repealing act. The Long Sault Company however will be unable to show that the Court of Appeals completely misapprehended the legislative power under the Constitution. There has never before in the history of the State occurred a grant of this nature over navigation, or a decision touching on its constitutionality, so there can be no rule of property in the State which the Court of Appeals should have observed. In our main brief [p. 51] we have emphasized the fact that NOT ONE OF THE ONE HUNDRED AND FIFTY OR MORE GRANTS TO BUILD DAMS IN THE STATE, CITED BY THE PLAINTIFF IN ERROR, WAS ACTUALLY OR OSTENSIBLY FOR THE PURPOSE OF IMPROVING NAVIGATION, AND THE GRANTS ARE THEREFORE AT ALL TIMES SUBJECT TO THE RESERVED RIGHT OF THE STATE TO COME IN AND IMPROVE NAVIGATION IN THOSE RIVERS WITHOUT COMPENSATION TO THE GRANTEES. EACH ONE WAS A GRANT TO A PRIVATE PERSON OR CORPORATION, FOR A PRIVATE PURPOSE, SUBJECT TO THE PARAMOUNT RIGHT OF THE STATE TO IMPROVE NAVIGATION. [See New York decisions at beginning of Point II of our main brief.] THE LONG SAULT GRANT WAS A GRANT TO A PRIVATE CORPORATION OF NOT ONLY THE RIGHT TO BUILD A DAM FOR PRIVATE WATER POWER PURPOSES BUT ALSO OF THE POWER TO EXERCISE UNLIMITED AND TO THE EXCLUSION OF THE STATE THE STATE FUNCTION OF NAVIGATION CONTROL IN THE ST. LAWRENCE RIVER.

As disclosing the character of all earlier grants to erect dams [cited by the plaintiff in error] and the point of dissimilarity between those grants and the grant to the Long Sault Company, we refer to the case of Weismer v. Village of Douglas, 64 N. Y. 91, 101, 102, wherein it was held that a municipality had no power of taxation to pay for bonds of a private company incorporated for the purpose of building a dam across the Delaware river for private water power purposes under a grant from the State to place the structure in the river. The decision proceeded on the theory that the corporation did not perform any public function and therefore an investment in its bonds was a use of public moneys in aid of a private enterprise and was unauthorized under the Constitution. At pages 101 and 102 occurs this language:

> It is " a private undertaking for private business and profit. The use of it to the public is secondary to that, and tributary to that; the benefit to the public is remote and consequential. So, too, the authority to dam the Delaware could as well have been given to an individual or a copartnership, and the results to the public are as far from being direct. The act conferring that authority does not, in its terms, indicate any public use or purpose in the building of the dam. The corporation is restricted in the building of it, so that it shall *be so made as not to interfere with the running of rafts in the river,* and the certificate of two judicial officers that it will not have that effect is a prerequisite to the erection of it, and the height of it is to be prescribed by them. *As this is the only mention of any public use and purpose in the act, and as this is named to be guarded from interference, it is not too much to say that the*

inference from the act itself is, that the legislature did not look upon the enterprise as other than private, for the private benefit of the corporation which received it."

Such was the character of all the grants to build dams cited by the plaintiff in error. They were merely dam privileges to private persons or corporations subject always to the State's power to improve navigation. In the Long Sault case, the company was likewise a private corporation with no duties to furnish water power to the public, and yet upon it was bestowed the public function of navigation control which included the power to better navigation or not to better it at the company's desire. That was the function and power which the Court of Appeals said could not be delegated or surrendered to a private corporation under the constitutional principles of our State:

> " The point that I desire to emphasize is that the legislature cannot authorize the conveyance of a navigable portion of the St. Lawrence *to a private company to maintain and control navigation thereon,* thereby parting for all time with its own power to improve such navigation. The privilege of the state to control the St. Lawrence as a navigable river (subject to the direction of Congress) cannot be assigned to others in the manner attempted by this legislation. As long as the waters are maintained as navigable they remain public waters of the state; and as long as they remain public waters of the state the state is bound to retain control over them in the public interest." (Record, p. 70.)

It is for the State courts of New York to determine what common law powers the government inherited over navigable waters, and what powers over navigable waters its people intended to confer upon its different governmental departments, or to state it differently, what powers over navigation the State Legislature possesses and may or may not barter away. The Court of Appeals of that State has determined that the Legislature under State constitutional principles did not possess the power to make this grant of navigation control to the Long Sault Company, and this court has persistently maintained that it cannot substitute its interpretation of State constitutional principles for that of the State courts. The Court of Appeals has made an honest test of the constitutionality of the Long Sault charter without reliance upon the repealing act, and its determination should be affirmed.

In answer to the argument on jurisdiction contained in plaintiff in error's supplemental brief, we disagree with the conclusion stated on page 2 thereof that the jurisdiction of this court "is predicated primarily upon the *incorrectness* of the State court's decision" as to the existence of a contract. We believe the inquiry of this court proceeds (1) was there subsequent legislation; (2) was that legislation made use of directly or indirectly by the court in arriving at its conclusion. If it was given effect, then (3) was there a contract which has been impaired through the decision. The correctness of the State court's determination as to the existence of a contract does not come under review here until the first two steps are disposed of by this court. If

the correctness of the State court's decision was first taken up, then this court would not have refused jurisdiction in the Cross Lake Fishing Club case, for it appears very clear to us that the Fishing Club did acquire contract rights under the Louisiana statute prior to its repeal. Jurisdiction however was refused by this court on the sole ground that the State court had decided the case upon a construction of the original statute regardless of the repealing act.

In all the cases cited by the plaintiff in error (Bridge Proprietors v. Hoboken Co., 1 Wall., 116; Wright v. Nagle, 101 U. S. 791; Louisiana Railway & Navigation Co. v. New Orleans, 235 U. S. 164; Terre Haute, etc., R. R. Co. v. Indiana, 194 U. S. 579; McCullough v. Virginia, 172 U. S. 102; Carondelet Canal and Navigation Co. v. State of Louisiana, 233 U. S. 362), jurisdiction was taken by this court not because there existed a subsequent legislative act (under the theory of the plaintiff in error the mere existence of a subsequent act would devolve the duty upon the court to at once inquire whether a prior contract existed), but because the subject matter of the suits was the *enforcement* of those subsequent acts. Of course if the question is whether subsequent acts are to be enforced then naturally the question of the existence of prior contract rights which the subsequent acts will invade immediately arises. The vital question in all those cases cited by the plaintiff in error was whether the subsequent laws should operate. The question in the Long Sault case never was whether the subsequent repealing act should operate upon the

company's contract rights. The Court of Appeals never gave that question consideration for it was not involved *in the test* of the constitutionality of the charter, sought by the Long Sault Company.

Nor has the Attorney-General ever sought to have the repealing act given effect, except insofar as he has contended that the repealing act has destroyed the present remedy by mandamus and has forced the company to a legal proceeding of some different nature to protect its alleged contract rights.

JURISDICTION SHOULD BE REFUSED AND THE WRIT DISMISSED.

E. E. WOODBURY,
Attorney-General,
Attorney for the State Treasurer,
Defendant in Error.

MERTON E. LEWIS,
C. T. DAWES,
Of Counsel.